Petition

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No.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

WIGGINS BROTHERS, INC., C. BRODIE HYDE,
PATRICIA HYDE, and FRANCES W. HYDE and
FIRST NATIONAL BANK IN DALLAS,
CO-TRUSTEES OF C. BRODIE HYDE TRUST A,
C. BRODIE HYDE TRUST B, PATRICIA HYDE TRUST A,
and PATRICIA HYDE TRUST B,
Petitioners,

v.

DEPARTMENT OF ENERGY and JAMES B. EDWARDS,
SECRETARY OF ENERGY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of The United States

October Term, 1981

No.

Wiggins Brothers, Inc., C. Brodie Hyde,
Patricia Hyde, and Frances W. Hyde and
First National Bank in Dallas,
Co-Trustees of C. Brodie Hyde Trust A,
C. Brodie Hyde Trust B, Patricia Hyde Trust A,
and Patricia Hyde Trust B,

Petitioners,

v.

Department of Energy and James B. Edwards,
Secretary of Energy,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the Temporary Emergency Court of Appeals ("TECA"), whose jurisdiction is limited to appeals in cases arising under §4(a) of the Emergency Petroleum Allocation Act ("EPAA") and titles I, II and V of the Energy Policy and Conservation Act ("EPCA"), had jurisdiction of the appeal in this case which arose under the "Marginal

Property Rule" promulgated by the Department of Energy pursuant to title IV of the EPCA.

2. Whether TECA adopted unprecedented canons for the construction of a regulation promulgated by a federal agency by:

a. interpreting terms used in a regulation to have entirely different meanings than those commonly understood in the industry which is subject to the regulation;

b. giving effect to an agency's intended meaning of a regulatory term even though that intent cannot be discerned from the regulation; and

c. construing a regulation in a manner which violates the policy of Congress expressed in the Act pursuant to which the regulation was promulgated.

3. Whether a panel of TECA has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, by declaring that prior decisions in another case are dispositive of the substantive issues presented in this case when:

a. the final judgment in the other litigation is *sub judice* before a different TECA panel; and

b. that final judgment, to which TECA made no reference, squarely supports Petitioners' contention that injection wells are "wells that produce crude oil" as that term is used in the Department of Energy's Marginal Property Rule.

LIST OF PARTIES AS REQUIRED BY RULE 21

The following is a full and complete list of the parties in this action:

WIGGINS BROTHERS, INC.
C. BRODIE HYDE
PATRICIA HYDE
C. BRODIE HYDE TRUST A
C. BRODIE HYDE TRUST B
PATRICIA HYDE TRUST A
PATRICIA HYDE TRUST B

The following is a full and complete list of officers, directors, or trustees of the above-identified parties:

Directors of Wiggins Brothers, Inc.:
Wm. R. Wiggins
Peter N. Wiggins, III
Iris Freeman

Officers of Wiggins Brothers, Inc.:
President — Wm. R. Wiggins
Vice President and Secretary-Treasurer —
Peter N. Wiggins, III
Assistant Secretary — Iris Freeman
Assistant Secretary — Donna C. Bailey

Co-Trustees of C. Brodie Hyde Trust A,
C. Brodie Hyde Trust B, Patricia Hyde Trust A,
and Patricia Hyde Trust B:
Frances W. Hyde
First National Bank in Dallas

The following is a full and complete list of other persons, associations of persons, firms, partnerships, corporations, or organizations that have a financial interest in, or another interest which could be substantially affected by, the outcome of this case (including a relationship as a parent or holding company, or similar relationship):

Charter International Oil Company,
Mobil Oil Corporation and
additional unknown purchasers of crude oil
produced from the properties in which
Petitioners have an interest

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

LIST OF PARTIES iv

TABLE OF AUTHORITIES vii

ORDERS AND OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT 6

I. THE TEMPORARY EMERGENCY COURT OF APPEALS ("TECA") DID NOT HAVE SUBJECT MATTER JURISDICTION OF THE APPEAL IN THIS CASE WHICH DID NOT ARISE UNDER SECTION 4(a) OF THE EMERGENCY PETROLEUM ALLOCATION ACT ("EPAA") OR UNDER TITLES I, II, OR V OF THE ENERGY POLICY AND CONSERVATION ACT ("EPCA") 6

A. The Marginal Property Rule Was Promulgated Pursuant to Title IV of the EPCA 6

B. The Marginal Property Rule Is Part of An Economic Incentive Program For Oil Producers; It Is Not Part of the Pricing Policy Established by § 4(a) of the EPAA 9

II. TO HOLD THAT THE TERMS "WELL" AND "WELLS THAT PRODUCED CRUDE OIL" USED IN THE MARGINAL PROPERTY RULE PLAINLY AND UNAMBIGUOUSLY DID NOT INCLUDE INJECTION WELLS, TECA VIOLATED THREE FUNDAMENTAL CANONS WHICH GOVERN THE CONSTRUCTION AND INTERPRETATION OF FEDERAL AGENCY REGULATIONS 13

Page

A. TECA Disregarded the Common Understanding of Terms of Art Used by a Regulated Industry Thereby Subjecting Regulated Persons to Potential Civil and Criminal Penalties 16

B. TECA Gave Effect to the DOE's Intent to Exclude Injection Wells From the Scope of the Term "Wells That Produced Crude Oil" Although to Do So It Had to Look Beyond the Words of the Marginal Property Rule to a Preamble Which Forms No Part of the Rule 17

1. In construing a regulation, an agency's intent is controlling only if clearly and adequately expressed 18

2. An agency's intention, when expressed only in a preamble but not in the operable, published provisions of a regulation, cannot control a federal court's interpretation of the terms used in the regulation itself 19

a. A preamble may not be used to construe a regulation which is plain and unambiguous 20

b. Where reference to a preamble is proper, the preamble must be examined only to clarify the objectives of the regulation 21

3. TECA erred in holding that an agency interpretation was binding on the district court 22

4. Giving effect to an agency's unexpressed intent can lead only to regulatory confusion 23

Page

C. By Excluding Injection Wells From the Ambit of the Term "Wells That Produced Crude Oil," TECA Reached a Result Inimical to the Policy of Title IV of the EPCA to encourage Domestic Oil Production By Providing Incentives to Producers of Marginal Properties 24

III. THE PANEL OF TECA WHICH HEARD THIS APPEAL SUBSTANTIALLY DEPARTED FROM ACCEPTED NORMS OF APPELLATE REVIEW BY PREJUDGING THE APPEAL IN THE "STRIPPER WELL LITIGATION" WHICH IS CURRENTLY PENDING BEFORE A DIFFERENT TECA PANEL 26

CONCLUSION 29

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Cases **Page**

Alabama Ass'n of Insurance Agents v. Federal Reserve System, 533 F.2d 224, *modified,* 558 F.2d 731 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1976) 20

Allied Chemical & Alkali Workers v. PPG Co., 404 U.S. 157 (1971) 22

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) 21

Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) 20

Bray v. United States, 423 U.S. 73 (1975) 11

Brennan v. OSHRC, 505 F.2d 869 (10th Cir. 1974) 17

Burns v. Alcala, 420 U.S. 575 (1975) 16

In the matter of Camden Shipbuilding Company, 227 F.Supp. 751 (S.D.Me. 1964) 20

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 17, 24

Duncan v. Theis, 613 F.2d 305 (Temp. Emer. Ct. App. 1979) 25

Dixon v. United States, 381 U.S. 68 (1965) 26

Energy Reserves Group, Inc. v. DOE, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978), *on remand,* 520 F.Supp. 1232 (D.Kan. 1981) 25, 26, 29

Getty Oil Company v. DOE, 581 F.2d 838 (Temp. Emer. Ct. App. 1978) 9

Grayned v. City of Rockford, 408 U.S. 104 (1972) 17

Cases (continued) **Page**

Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379 (1883) 13

Morton v. Ruiz, 415 U.S. 199 (1974) 25

Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) 12

Pacific Coast Medical Enterprises v. Harris, 633 F.2d 123 (1980) 17

Perrin v. United States, 444 U.S. 37 (1979) 14, 16, 24

Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980) 20

Rucker v. Wabash Railroad Co., 418 F.2d 146 (7th Cir. 1969) 20

SEC v. Sloan, 436 U.S. 103 (1978) 25

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 22

Tenneco Oil Co. v. FEA, 613 F.2d 298 (Temp. Emer. Ct. App. 1979) 16, 17, 18, 19

Texaco, Inc. v. DOE, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979) 12

Transcontinental Gas Pipe Line Corp. v. FERC, 659 F.2d 1228 (D.C. Cir. 1981) 11

United States v. Cuomo, 525 F.2d 1285 (1976) 17

United States v. Larionoff, 431 U.S. 864 (1977) 24

Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977) 18

Yazoo & MVR Co. v. Thomas, 132 U.S. 174 (1889) 20, 21

Statutes and Regulations

1 C.F.R. § 18.12 19

10 C.F.R. § 205.202, *et seq.* 18

10 C.F.R. § 212.54 .... 9, 25, 27

Statutes and Regulations (continued)	Page
10 C.F.R. § 212.72	27
10 C.F.R. § 212.74	27
5 U.S.C. § 551, *et seq.*	8, 19
12 U.S.C. § 1904 note	2, 4, 6
15 U.S.C. § 717	11
15 U.S.C. § 751, *et seq.*	2, 6, 10
15 U.S.C. § 753(a)	6
15 U.S.C. § 757	6, 25
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	11
28 U.S.C. § 1331	4
28 U.S.C. § 2201	4
28 U.S.C. § 2202	4
42 U.S.C. § 6201(3)	2, 11, 25
42 U.S.C. § 6393	7
43 U.S.C. § 1651, *et seq.*	25, 27
41 Fed.Reg. 18873 (1976)	8
41 Fed.Reg. 56623 (1976)	19
44 Fed.Reg. 25160 (1979)	2, 3
Cong. Rec. December 9, 1975 at H12125	10

Miscellaneous	
Carroll, L., *Through the Looking Glass* (Schocken Books, New York 1978)	23

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FIRST NATIONAL BANK IN DALLAS,
CO-TRUSTEES OF C. BRODIE HYDE TRUST A,
C. BRODIE HYDE TRUST B, PATRICIA HYDE TRUST A,
and PATRICIA HYDE TRUST B,
Petitioners,

v.

DEPARTMENT OF ENERGY and JAMES B. EDWARDS,
SECRETARY OF ENERGY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners, Wiggins Brothers, Inc., et al, hereby petition for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals entered on October 14, 1981, which reversed a decision of the United States District Court for the Northern District of Texas.

ORDERS AND OPINIONS BELOW

The unreported opinion of the district court is found at A-1. The unreported decision of the Temporary Emergency Court of Appeals is found at A-10.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals ("TECA") in this case was entered on October 14, 1981. Petitioners' Motion for Rehearing and Request for Rehearing En Banc were denied by TECA by order dated November 27, 1981. By order dated December 7, 1981, TECA granted a Stay of Mandate for 30 days from November 27, 1981 pending the filing of a Petition for Writ of Certiorari with this Court and thereafter until final disposition of the case by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and this Court's general power to supervise lower federal courts. Alternatively, if this Court determines that the Temporary Emergency Court of Appeals had jurisdiction to entertain the appeal in this case, this Court's jurisdiction is invoked under § 211(g) of the Economic Stabilization Act. 42 U.S.C. § 1904 note.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations, reproduced in the Appendix, are involved in this case:

The Marginal Property Rule, 44 Fed. Reg. 25160 (1979);

Provisions of the Economic Stabilization Act, 12 U.S.C. § 1904 note, §§ 201, *et seq.;*

Provisions of the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, *et seq.;* and

Provisions of the Energy Policy and Conservation Act, 42 U.S.C. § 6201, *et seq.*

STATEMENT OF THE CASE

The Marginal Property Rule (sometimes referred to as the "Rule") was promulgated by the Department of Energy ("DOE") on April 5, 1979, pursuant to the statutory authority granted in title IV of the Energy Policy and Conservation Act ("EPCA"). The Rule was to effectuate the policy of the EPCA to maximize domestic oil production by providing economic incentives to producers. Prior to oil price deregulation by President Reagan on January 28, 1981, the Rule allowed an oil producer to charge a regulated price in excess of that which would otherwise have been allowed for crude oil produced from a "marginal property".

The Rule permitted producers to receive higher prices for oil produced from certain categories of properties, depending primarily on a property's "average daily production" per "well" and the average depth to which the wells located on those properties are drilled. The Rule defined a marginal property as follows:

> "Marginal property" means a property whose average daily production of crude oil (excluding condensate recovered in non-associated production) per *well* during the calendar year 1978 did not exceed the number of barrels shown in the following table. . . .

44 Fed.Reg. 25160 (1979) (emphasis added).

The Rule stated that "average daily production"

> means for each particular marginal property qualified maximum total production of crude oil . . . produced from a property, divided by 365 times the number of *wells that produced crude oil* . . . from the property during the year 1978 . . .

Id. (emphasis added).

Nowhere does the regulation define the terms "wells" and "wells that produced crude oil."

For purposes of the Marginal Property Rule, two types of wells are significant; recovery wells (i.e. wells through which oil is extracted) and injection wells. An injection well is a well which injects water, steam, natural gas or other substances into a petroleum reservoir to replace natural pressure and thereby increase oil recovery. In any oil field, as oil is removed from the common reservoir, pressure created by gas, water, or both, is depleted. If the drive mechanism is not somehow supplemented so as to maintain pressure in the reservoir, the field will go into production decline and as little as twenty percent of the oil in the formation may be ultimately produced. For this reason, at some stage in the oil field development "secondary recovery" operations are initiated.

The secondary recovery method relevant to the present case is that of "water flood." In a water flood operation, certain wells are either drilled as, or converted to, injection wells. The water injected by the injection wells displaces the oil located ahead of it and maintains reservoir pressure. In effect, a water flood operation will substantially increase total ultimate recovery from the oil reservoir, sometimes as much as 400% to 500%.

Wiggins filed this suit to establish that injection wells and recovery wells could be counted in computing the number of "wells that produced crude oil" on a property to determine the applicability of the Rule and the incentives it offered to producers of marginal properties. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 2201 and 2202 and § 211(a) of the Economic Stabilization Act, 12 U.S.C. § 1904 note.

Petitioners are working interest owners of an oil producing property known as the Dean Unit. It is a "marginal property" if injection and recovery wells are counted in the formula established by the Rule. If only recovery wells are counted, it is not.

The Dean Unit averages approximately 15,000 barrels per month of crude oil production attributable to Petitioners and the majority of the production, in the absence of marginal property treatment, would have sold for $6.00 per barrel. If the unit qualifies as a marginal property, most of this production would have merited a price of at least $13.24 per barrel.

The DOE has taken the position that only recovery wells could be counted for purposes of determining the applicability of the Rule and the incentives it offered. The DOE's position is that the terms "well" and "wells that produced crude oil" in the Rule do not include injection wells even though oil would not be produced without them.

In November 1979, Wiggins sued the DOE in the United States District Court for the Northern District of Texas seeking declaratory and injunctive relief requiring the DOE to include injection wells as wells that produced crude oil for purposes of determining the applicability of the Rule.

Petitioners pointed out that the DOE's intent to exclude injection wells from the definitions of "well" and "wells that produced crude oil" was:

> (1) not expressed in the Rule but only in a "preamble" which formed no part of the Rule and was never published in the Code of Federal Regulations;
>
> (2) not only contrary to, but precisely opposite to the plain meaning of the term as commonly used in the industry which was regulated by the Rule; and
>
> (3) contrary to the intent of other regulatory agencies, both state and federal.

The district court granted Wiggins' motion for summary judgment and entered judgment declaring that the terms "well" and "wells that produced crude oil" include injection wells and enjoined the DOE from preventing the counting of injection wells in the application of the Rule to Wiggins' property.

The Temporary Emergency Court of Appeals ("TECA") reversed the decision of the trial court on October 14, 1981 and denied Petitioners' Motion for Rehearing and Request for Rehearing En Banc on November 27, 1981.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE TEMPORARY EMERGENCY COURT OF APPEALS ("TECA") DID NOT HAVE SUBJECT MATTER JURISDICTION OF THE APPEAL IN THIS CASE WHICH DID NOT ARISE UNDER SECTION 4(a) OF THE EMERGENCY PETROLEUM ALLOCATION ACT ("EPAA") OR UNDER TITLES I, II OR V OF THE ENERGY POLICY AND CONSERVATION ACT ("EPCA").

A. *The Marginal Property Rule Was Promulgated Pursuant to Title IV of the EPCA.*

The Marginal Property Rule was promulgated pursuant to §401 of the EPCA, 15 U.S.C. §757 (which added §8 to the EPAA), a statutory provision which is not within TECA's specified jurisdiction. TECA was originally created to adjudicate appeals in cases arising under the Economic Stabilization Act ("ESA"), 12 U.S.C. §1904 note (1973). Section 211(b)(2) of the ESA provides that ". . . the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." *Id.*

In 1973, Congress passed the EPAA, 15 U.S.C. §751, *et seq.* Section 4(a) of the EPAA, 15 U.S.C. §753(a), requiring that the President, not later than 15 days after November 27, 1973, promulgate a regulation providing for the mandatory allocation of crude oil, and other petroleum products in amounts, and at prices, specified in such regulation. The similarity of the allocation program under the EPAA, as originally enacted, to the ESA naturally suggested the same administration and enforcement proceedings for § 4(a) as were used under the ESA. Thus, Congress provided in § 5(a) of the EPAA that:

> . . . §§ 209 through 211 of the Economic Stabilization Act of 1970 . . . *shall apply to the regulation promulgated under § 4(a)* [15 U.S.C § 753(a)], to any order under this Act, and to any action taken by the President or his delegate under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970. . . .

Id. (emphasis added).

The EPCA adopts the foregoing judicial review procedures for proceedings arising under certain provisions of the EPCA. But cases arising under the statutory provision pursuant to which the Marginal Property Rule was promulgated are *not* subject to those procedures. Section 523(b), 42 U.S.C. § 6393(b) of the EPCA provides that:

> The procedures for judicial review established by Section 211 of the Economic Stabilization Act of 1970 [now found at 12 U.S.C. § 1904 note] shall apply to proceedings to which subsection (a) applies, as if such proceedings took place under such Act. Such procedures for judicial review shall apply notwithstanding the expiration of the Economic Stabilization Act of 1970.

Subsection (a), referred to in § 523(b), 42 U.S.C. § 6393 (a), provides, in part:

> (a)(1) Subject to paragraphs (2), (3), and (4) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code, [the Administrative Procedure Act] shall apply *to any rule, regulation, or order having the applicability and effect of a rule* as

> defined in section 551(4) of Title 5, United States Code, *issued under Title I* (other than section 103 thereof) *and title II of this Act, or this title* [*i.e.,* title V] (other than any provision of such titles which amends another law).

(emphasis added). Subsections (a) and (b) plainly exclude cases arising under title IV of the EPCA from the judicial review section of the ESA. Section 401 of the EPCA, the statutory authority for the Marginal Property Rule,[1] is part of title IV of that Act. Cases arising under title I (governing domestic energy supplies and strategic petroleum reserves), title II (governing general emergency authorities and authorities with respect to international energy programs) and title V (containing various general provisions) are, therefore, subject to appellate review by TECA. Cases, such as the instant case, which arise under title IV (governing pricing policy and amendments to the Allocation Act) follow the customary route of appellate review to the circuit courts of appeals.

---

[1] The Marginal Property Rule was promulgated pursuant to statutory authority granted by the EPCA which, *inter alia,* added §§ 8-12 to the EPAA. The DOE stated in its initial notice of proposed rule making and public hearing on the Marginal Property Rule, 41 Fed. Reg. 18873, May 7, 1976, that the Rule was in response to § 8(d)(3) of the EPAA.

Section 4(a) itself provided no authority for promulgation of the Marginal Property Rule. Section 12 of the EPAA states:

> The President may not amend the regulation under § 4(a) in any manner which –
>
> (1) exempts crude oil produced in the United States from any provision of such regulation required to be made a part of such regulation by § 8; or
>
> (2) results in making such regulation, as so amended, inconsistent with any limitation or other requirements specified in § 8.

TECA was thus granted jurisdiction only over appeals from district court judgments involving (1) the ESA, (2) regulations or orders under the ESA, (3) the regulation promulgated under § 4(a) of the EPAA, (4) an order under the EPAA, (5) actions taken by the President or his delegate under the EPAA and (6) titles I, II or V of the EPCA. There is no matter presented in this case which falls within any of those categories.

B. *The Marginal Property Rule Is Part of An Economic Incentive Program For Oil Producers; It Is Not Part of the Pricing Policy Established by § 4(a) of the EPAA.*

By the DOE's own admission, the Marginal Property Rule is not part of the pricing policy under § 4(a) of the EPAA, but an exemption to it. In its brief on appeal to TECA, DOE said that "the regulation [*i.e.*, Marginal Property Rule] provides for an *exemption* from the normal restraints upon the pricing of crude petroleum analogous to the department's long standing stripper well *exemption* regulation. 10 C.F.R. § 212.54 (1979)." (emphasis added).

TECA itself has recognized that the DOE is without authority under § 4(a) to make exemptions to the pricing policies of the EPAA. In *Getty Oil Company v. Department of Energy,* 581 F.2d 838 (Temp. Emer. Ct. App. 1978), Getty claimed that the DOE's failure to include a particular solvent in the regulation promulgated under § 4(a) demonstrated its intent to exclude it. As TECA stated:

> The FEO and the FEA (DOE) had no power to "exempt" any covered products by regulation. The power to exempt products covered by the EPAA was reserved to the President and Congress and required to be exercised in the manner prescribed by § 706(a) [§ 12 of the EPAA].

581 F.2d at 842.

Congress did not extend TECA's jurisdiction to review matters arising under title IV of the EPCA, as the purposes of the EPAA as originally enacted and those of title IV of the EPCA are entirely different. The EPAA, enacted in response to the shortages of crude oil caused by the Arab oil embargo of 1973, was intended to deal with a national emergency:

> The purpose of this Act is to grant to the President of the United States and direct him to exercise specific statutory authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system.

15 U.S.C. § 751.

The economic incentives provided by title IV of the EPCA, on the other hand, were a departure from the policies of price and allocation controls which had been in effect for more than two years. Section 8, pursuant to which the Marginal Property Rule was promulgated, was part of a long range permanent effort to increase petroleum production. Unlike the EPAA, it did not have as its purpose the control of prices and supplies to meet an exigent situation, but was intended to fill two roles:

> In the short term, the Act is designed to reduce the vulnerability of the domestic economy to increases in import prices and to insure that available supplies will be distributed equitably in the event of a disruption in petroleum imports. For the long run, the Act will decrease dependence upon foreign imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford.

Joint Explanatory Statement of the Committee of Conference, Cong. Rec. December 9, 1975 at H12125. One of the specific purposes of the EPCA, as stated in the statute itself, was "to increase the supply of fossil fuels in the United States, through price incentives and production requirements." 42 U.S.C. § 6201(3). Therefore, cases arising under title IV of the EPCA did not require the oversight of an emergency court of appeals.

The particular statute under which a challenged regulation is promulgated determines whether TECA has jurisdiction of an appeal. In *Transcontinental Gas v. Federal Energy Regulatory Commission,* 659 F.2d 1228 (D.C. Cir. 1981), the D.C. Circuit was required to determine whether it or TECA had jurisdiction of an appeal. FERC had been presented with a requested rate increase under the Natural Gas Act, 15 U.S.C. § 717 (1976). FERC denied the rate request due to the inconsistency of the request with the ESA. Though the order of FERC gave as its basis the ESA and the price control regulation promulgated pursuant to the ESA, of which TECA has exclusive jurisdiction, the court emphasized that the specific authority under which the order was promulgated is controlling.

> As we have already said, the order before us was promulgated under the Gas Act. It required construction of that Act and the commission's product was distinctively an interpretation thereof notwithstanding the indulgence of Stabilization Act policy reflections during the process.

659 F.2d at 1237.

This Court has held that the jurisdiction given TECA carved out a limited exception to the broad jurisdiction of the courts of appeals over appeals from all final decisions of the district courts of the United States under 28 U.S.C. § 1291. *Bray v. United States,* 423 U.S. 73 (1975). This Court has also emphasized that "it is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 364, 374 (1978). TECA itself has recognized that courts of special, limited jurisdiction should strictly construe their statutory grants of jurisdiction. *Texaco Inc. v. DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979).

TECA was without authority to determine the appeal in this case where the only issues distinctly involved interpretation of the Marginal Property Rule. The issues presented by this case arose solely from a regulation promulgated under title IV of the EPCA. The EPCA did not provide for review by TECA of cases arising under title IV of that Act (including § 401 which is § 8 of the EPAA) and, in the absence of express authority, no jurisdiction for TECA should be implied. Any potential relationship of the issues raised in this case and the regulatory program created under § 4(a) of the EPAA is immaterial to a determination of TECA's jurisdiction. Only the narrowest of issues was decided by the district court — the meaning of the words of the regulation itself, an issue directly tied to the statute pursuant to which it was promulgated.

Congress did not employ equivocal language in precisely defining TECA's jurisdiction. When it promulgated the EPAA, Congress chose to delineate specifically the types of EPAA cases over which TECA was to have jurisdiction. Congress did not simply confer upon TECA all appellate jurisdiction in cases "arising under the EPAA" (as it had done in the ESA). The EPCA was not designed to effectuate the price control system of § 4(a). It was a specially crafted exemption from that system enacted for the purpose of providing incentives to encourage greater domestic production of crude oil. Congress, apparently concluding that the regulatory incentives, unlike the price control system itself, did not require review by an emergency court, declined to expand TECA's jurisdiction. Jurisdiction over this appeal properly lay in the United States Court of Appeals for the Fifth Circuit.

Respondents, either through inadvertence or to take advantage of what they considered to be a more favorable appellate forum, took an appeal to TECA. Petitioners admit that they did not challenge TECA's jurisdiction below; but lack of subject matter jurisdiction can be raised at any level of review for it is a fundamental tenet of the Judiciary Article of the Constitution, oft reiterated by this Court, that a federal court without subject matter jurisdiction is powerless to rule upon a controversy brought before it. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379 (1883).

This Court should, therefore, grant the writ of certiorari requested by this petition and summarily vacate TECA's judgment. But Petitioners understand the significance of this case to the government as well as to the petroleum industry and appreciate that if this Court does no more than vacate the judgment on appeal Respondents could be deprived of meaningful appellate review. Petitioners, therefore, suggest that this Court direct that this case be remanded to the district court for entry of a fresh judgment from which Respondents may, if they so desire, perfect a timely appeal to the United States Court of Appeals for the Fifth Circuit.

II. TO HOLD THAT THE TERMS "WELL" AND "WELLS THAT PRODUCED CRUDE OIL" USED IN THE MARGINAL PROPERTY RULE PLAINLY AND UNAMBIGUOUSLY DO NOT INCLUDE INJECTION WELLS, TECA VIOLATED THREE FUNDAMENTAL CANONS WHICH GOVERN THE CONSTRUCTION AND INTERPRETATION OF FEDERAL AGENCY REGULATIONS.

A writ should be granted in this case because the decision of TECA, if left intact, would adopt for lower federal courts a standard for review of federal agency regulations which has never been sanctioned by this Court.

It has long been accepted that terms used in a regulatory context must be accorded their commonly understood meaning. This Court unequivocally announced that rule for statutory construction in *Perrin v. United States,* 444 U.S. 37, 42 (1979). It seems most unlikely that this Court would countenance the application of a less restrictive standard to a federal agency than it has applied to Congress. TECA disregarded this important principle of construction. Despite uncontroverted evidence that compelled the district court to find that the terms "wells" and "wells that produced crude oil" are terms which, in the common parlance of the petroleum industry, clearly and unambiguously encompass injection wells, TECA concluded that the terms clearly and unambiguously did not include injection wells.

To support its conclusion, TECA had to rely upon its breach of a second bedrock precept governing regulatory construction. The intent of a regulatory agency, if not adequately expressed, cannot serve as the basis for interpreting a regulation. Nevertheless, TECA looked, not to the words of the Marginal Property Rule, but to a "preamble" published in the Federal Register (but not in the Code of Federal Regulations) to glean the DOE's intent to exclude counting injection wells for purposes of the Marginal Property Rule. TECA held that, for purposes of the Rule, injection wells are "plainly and unambiguously" not "wells that produced crude oil" even though it had to look to evidence *de hors* the Rule to determine that "unambiguous" meaning. The rule of construction embraced by TECA could become a dangerous precedent to allow agencies to regulate based upon their unexpressed intent. Such a rule is at odds with proper construction of regulations as well as written instruments of all types. Permitting reliance upon an agency's "parol intent" (especially as here where it is at odds with the common understanding of the industry which must abide by the regulation) would condone regulation by ambush.[2] Before such a creative approach to regulatory construction is announced to federal trial courts by a temporary intermediate appellate court, it should be carefully scrutinized by this Court in the exercise of its supervisory jurisdiction.

Finally, TECA interpreted a regulation in a manner which thoroughly frustrates the policy of the statute pursuant to which it was promulgated. This result is clearly at odds with principles of judicial administration announced by this Court. The EPCA was designed to stimulate domestic oil production by giving economic incentives to producers of marginal properties. By not including injection wells as "wells that produced crude oil" for purposes of the Marginal Property Rule, TECA has determined that incentives are not available to a producer who must operate two wells (one injection, one recovery) to produce a given volume of oil but would be available to a producer who produced an identical volume of oil by operating two recovery wells. The same economic incentives should apply to both producers.

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[2] The district court, when confronted with the proposition that the intent to exclude injection wells was placed in the preamble as opposed to the regulation, stated:

> I just can't understand that. I just can't understand that sort of incompetency. This is a matter which has been a focal point of many suits and litigations, MDL this suit and I don't know what else, and yet they put it in the preamble and they leave it out of the body. Are they trying to trick somebody? Are they trying to hide something or is it purely carelessness?

Transcript of February 21, 1980 hearing at 23.

A. *TECA Disregarded the Common Understanding of Terms of Art Used by a Regulated Industry Thereby Subjecting Regulated Persons to Potential Civil and Criminal Penalties.*

The Marginal Property Rule does not define the terms "well" and "wells that produced crude oil". As the trial court found, the terms have very definite meanings to those who work in the industry regulated by the Rule. Moreover, the terms have no relevant meaning outside the industry; and the regulation subjects only those within the industry to its control. Injection wells and recovery wells cost essentially the same to operate and maintain. It is only because injection wells, working together with recovery wells, produce additional volumes of crude oil that producers are willing to incur the expense of operating them. The idea that injection wells are "wells that produced crude oil" is hardly a gimmick to take advantage of benefits offered by a regulatory program. Sound petroleum engineering and the maximization of domestic production dictate that secondary recovery be initiated at the appropriate time in the life of an oil field.

TECA disregarded what it had earlier called "the first principle of regulatory construction . . . that regulatory terms must be interpreted according to their commonly understood definitions in the absence of a specific regulatory definition." *Tenneco v. FEA,* 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979)

TECA's decision to disregard the common understanding of the terms in question conflicts with the rule of construction consistently applied by this Court. "[A] fundamental canon in statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin, supra, citing Burns v. Alcala,* 420 U.S. 575, 580-581 (1975). And where terms of art or technical terms commonly used in a regulated industry are used in a statute, they should be defined by reference to their usage in the regulated industry. *See Corning Glass Works v. Brennan,* 417 U.S. 188, 201 (1974). These teachings of this Court have been assiduously followed by the circuits. *See Pacific Coast Medical Enterprises v. Harris,* 633 F.2d 123 (9th Cir. 1980); *United States v. Cuomo,* 525 F.2d 1285 (5th Cir. 1976) ("the sense of a word that is commonly used as a term of art in a particular discipline is the relevant sense for the purpose of statutory construction where the statute being construed deals with that discipline").

The necessity of such a rule is self-evident. As TECA expressed on another occasion, "regulations must be reasonably comprehensible to those obligated to follow them, and agency interpretations which render the regulatory language meaningless or unpredictable in meaning should not be condoned." *Tenneco,* 613 F.2d at 302.

If a regulator is permitted to interpret regulations by employing an unusual meaning of words, persons regulated would be deprived of fair notice of that which is expected of them in violation of their due process rights. *See Brennan v. OSHRC,* 505 F.2d 869 (10th Cir. 1974). Fundamental fairness requires that regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. *See Grayned v. City of Rockford,* 408 U.S. 104, 107 (1972) ("First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.")

B. *TECA Gave Effect to the DOE's Intent to Exclude Injection Wells From the Scope of the Term "Wells That Produced Crude Oil" Although to Do So It*

Had to Look Beyond the Words of the Marginal Property Rule to a Preamble Which Forms No Part of the Rule.

1. *In construing a regulation, an agency's intent is controlling only if clearly and adequately expressed.*

A regulation cannot be construed to mean what an agency intended but did not adequately express. *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977). The district court, guided by the plain meaning of the contested phrase as unambiguously understood by the regulated industry, held that because the DOE had failed to express adequately its contrary intention, the plain meaning of the words used in the Rule must control. The district court, therefore, ruled that for purposes of the Marginal Property Rule injection wells are "wells that produced crude oil." The district court correctly held that where one may become subject to civil or criminal sanctions the language creating the liability must be clearly expressed. A-4.

As TECA earlier proclaimed in *Tenneco:*

> A court cannot put its imprimatur on a regulation that was intended but never enacted. . . . If Tenneco's "plain meaning" interpretation of the price control regulations is incorrect, Tenneco may be exposed to civil or criminal penalties for its alleged overcharges.

613 F.2d at 303. If the plain meaning of "wells that produced crude oil" is subverted by the DOE, Wiggins and those similarly situated will be subject to both civil and criminal sanctions. 10 C.F.R. § 205.202 *et seq.* In its opinion, TECA stated that reasonable notice of an agency's intent to depart from the meaning of the words used in a regulation is important only where potential criminal penalties are involved but is irrelevant "in this civil proceeding." TECA cited no authority for this distinction and, indeed,

there is none. The right to notice cannot hinge on the potential applicability of criminal penalties. Moreover, TECA's reasoning was erroneous for the penalties of which TECA itself spoke in *Tenneco,* civil *and criminal,* are identical to those which threaten Wiggins in the present case.

2. *An agency's intention, when expressed only in a preamble but not in the operable, published provisions of a regulation, cannot control a federal court's interpretation of the terms used in the regulation itself.*

TECA misapprehended the nature and significance of a preamble to a regulation. A preamble in the Federal Register is merely a statement of background and is not part of a final rule itself. Rules of the Administrative Committee of the Federal Register require that each agency submitting a proposed or final rule for publication prepare a preamble "which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal." 1 C.F.R. § 18.12. In the preamble to the document revising 1 C.F.R. § 18.12, the Administrative Committee addressed a comment which had suggested that a disclaimer clause be included as part of all preambles to highlight the fact that the preamble is merely a reader's guide and of no legal effect. The Committee responded:

> The Committee does not believe that a stronger disclaimer statement would be of any value. Rather, normal rules of construction would apply. That is, *the courts would follow the language of a regulation as long as it were clear and would look to materials not included in the regulation, such as the preamble statement, only to clarify ambiguity.*

41 Fed. Reg. 56623, 56624 (Dec. 29, 1976). (emphasis added).

The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, requires that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). "[T]he agency's obligation [is] to publish a statement of reasons [pursuant to § 553(c)] that will be sufficiently detailed to permit judicial review." *Alabama Ass'n of Insurance Agents v. Federal Reserve System,* 533 F.2d 224, 236, *modified* 558 F.2d 731 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1976). This provision is intended to insure that judicial review of agency action is meaningful by "enabl[ing the Court] to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." *Automotive Parts & Accessories Ass'n. v. Boyd,* 407 F.2d 330, 338 (D.C. Cir. 1968). This general statement is not intended to supply missing parts of the regulation. The prefatory statement of an agency is in the nature of a goal and is not actually part of an adopted regulation. *Rowell v. Andrus,* 631 F.2d 699 (10th Cir. 1980).

a. A preamble may not be used to construe a regulation which is plain and unambiguous.

Where the language of a statute is plain and unambiguous, a court may not properly resort to the preamble as an aid in its construction. *Yazoo & MVR Co. v. Thomas,* 132 U.S. 174, 190 (1889); *In the matter of Camden Shipbuilding Company,* 227 F.Supp. 751, 753 (S.D.Me. 1964). Administrative regulations should be construed by courts according to the same rules of construction applicable to statutes. *Rucker v. Wabash Railroad Company,* 418 F.2d 146 (7th Cir. 1969). A preamble can neither restrict nor expand the meaning of an unambiguous statute and it cannot be relied upon to create doubt or uncertainty which does not otherwise exist.

> A preamble [to a statute] no doubt contributes to a general understanding of a statute, but it is not an

> operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.

Association of American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (note omitted).

TECA did not find the Marginal Property Rule ambiguous. To the contrary, it found the Rule clear and unambiguous. Nevertheless, it ignored the century-old precedent of *Yazoo* and gave controlling effect to the preamble without explaining why terms clearly understood in the regulated industry were not accorded their customary meaning.

b. Where reference to a preamble is proper, the preamble must be examined only to clarify the objectives of the regulation.

Even if the terms at issue were ambiguous, TECA accorded the preamble undue significance. TECA used the preamble to supplement the Rule. A preamble is not to be used to supply definitions omitted from a regulation; rather, a preamble is to be used as a statement of the basis and purpose of a regulation.

The preamble (if relevant at all), merely serves as an aid to a court in resolving the question of whether excluding injection wells from the definition of "wells that produced crude oil" is consistent with the objectives to be achieved by the Marginal Property Rule. Such an exclusion is inconsistent with those objectives.

TECA concluded that the phrase "wells that produced crude oil" is clear and unambiguous. TECA reached this conclusion by reference to the preamble which it should not have considered if the phrase is indeed unambiguous. TECA's actions are analogous to a court receiving parol evidence after finding that a contract is clear and unambiguous and then giving meaning to the contract by reference to that evidence as opposed to the plain meaning of its language.

3. TECA erred in holding that an agency interpretation was binding on the district court.

The preamble is not an agency interpretation of the Marginal Property Rule. The preamble is simply a statement of the basis and purpose for issuing the Rule. Even if the preamble could be considered an interpretation, it could not be controlling upon a federal district court called upon to review an agency's regulation. *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). TECA's decision that the agency's interpretation was controlling on the district court is error. An administrative ruling is entitled to deference but it can never be binding on the court to the extent that review of the effect of the interpretation is foreclosed. *Allied Chemical and Alkali Workers v. PPG Co.,* 404 U.S. 157, 182 (1971). The authority to be given an agency's interpretation was dispositively announced in *Skidmore:*

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140.

The district court noted the relevance of the DOE's interpretation of the Marginal Property Rule in its decision.

But the district court was not persuaded by the DOE's interpretation. For TECA to hold that the DOE's intent was controlling on the district court under these circumstances establishes a rule which is at variance with decisions of this Court and the very nature of the relationship between the executive and judicial branches.

4. Giving effect to an agency's unexpressed intent can lead only to regulatory confusion.

Displacing an industry's understanding of a term of art with the "intent" of a federal regulatory agency when that intent cannot be discerned from the face of a regulation can lead only to confusion. The mandate of every federal agency is to carry out the statutory policies of acts of Congress. The DOE's *raison d'etre* is to regulate the oil industry to further statutory purposes which themselves effectuate federal energy policy. The DOE's mandate is not to engage in creative lexicography. If the DOE, with the approval and sanction of TECA, can redefine terms of art which have no meaning outside the oil industry, the DOE is imbued with that power to ascribe any meaning whatsoever to a term which only Humpty Dumpty has had the audacity to claim.[3]

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[3] 'But "glory" doesn't mean "a nice knockdown argument,"' Alice objected.

'When *I* use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean different things.'

'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'

Lewis Carroll, *Through The Looking Glass* (Schocken Books, New York 1978) at 197.

This Court should not permit TECA to announce a rule of review of administrative action which requires federal courts to defer to an agency's novel definition which cannot be determined by reference to the text of the regulation at issue. An agency's "expertise" cannot serve as a basis to allow it to use a term in a manner contrary to the accepted meaning of the term as used in the industry regulated by the agency. If an agency can ascribe novel meanings to terms which have acquired contrary accepted meanings, no regulation will ever be clear on its face. Every term in a regulation will be subject to judicial interpretation at a substantial cost to litigants. The waste of judicial resources would be enormous. Regulatory schemes will be inherently unreliable if those who are regulated must question the words used by an agency and guess whether the agency is acting in a linguistic world of its own. It will be necessary to interpret every regulation by reference to extrinsic sources. These are the horribles which have prompted this Court to caution that words used in a statute or regulation must be accorded their commonly understood meaning. *Perrin* and *Corning Glass Works, supra.*

C. *By Excluding Injection Wells From the Ambit of the Term "Wells That Produced Crude Oil," TECA Reached a Result Inimical to the Policy of Title IV of the EPCA to Encourage Domestic Oil Production By Providing Incentives to Producers of Marginal Properties.*

A federal court must not construe an agency regulation in a manner which would frustrate the goals Congress sought to achieve by enacting the statute pursuant to which the regulation was promulgated. *United States v. Larionoff*, 431 U.S. 864 (1977).

The Marginal Property Rule was promulgated by the DOE pursuant to title IV of the EPCA. The DOE's interpretation of the Rule must be consistent with the purpose and intent of that statute. *See SEC v. Sloan,* 436 U.S. 103 (1978); *Morton v. Ruiz,* 415 U.S. 199 (1974). The policy of the EPCA is plain: to "increase the supply of fossil fuels in the United States, through price incentives and production requirements." 42 U.S.C. § 6201(3). The EPCA demonstrates an undeniable congressional interest in providing production incentives for "sustaining production from marginal wells." 15 U.S.C. § 757.

The DOE's interpretation of "wells that produced crude oil", which was upheld by TECA, is fundamentally at odds with the specific statutory purposes of the EPCA. Construing the same phrase as used in the Stripper Well Exemption Regulation[4], the Court in the so-called "Stripper Well Litigation"[5] stated:

> The definitive test for the proper interpretation of any statutory provision is whether a given interpretation will fulfill the congressional goals and purposes of the statute. There are no principled reasons for the proposition that including recovery wells in a secondary recovery project while excluding injection wells will serve any purpose of the statute. The contribution made by these two types of wells to the process of production are [sic] similar. But for injection wells, large amounts of oil would never be produced. The costs of drilling or maintaining injection wells are as large or larger than comparable costs on a recovery well. Because of natural forces, a provision allowing

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[4] 10 C.F.R § 212.54, originally promulgated pursuant to the statutory stripper well exemption, § 406(a) of the Trans Alaska Pipeline Authorization Act (current version at 43 U.S.C. § 1651 *et seq.*) as interpreted by DOE Ruling 1974-29.

[5] *Energy Reserves Group, Inc. v. DOE,* 589 F.2d 1082 (Temp. Emer.Ct.App. 1978), *on remand,* 520 F.Supp. 1232 (D. Kan. 1981), currently pending on appeal before TECA; and *Duncan v. Theis,* 613 F.2d 305 (Temp.Emer.Ct.App. 1979).

> the counting of injection wells has no greater potential for abuse than a provision excluding the counting of injection wells. Likewise, as noted, state oil regulatory practices are designed to prevent industry abuse. The statutory goals of preventing shutdown of marginally productive properties, of producing domestic oil that would otherwise be purchased from foreign sources, and of flushing more oil out of the oil reservoirs, are all served by allowing injection wells to be included in the well count.

Energy Reserves, 520 F.Supp. at 1264. These observations are equally applicable and cogent in the context of the Marginal Property Rule. Where an agency promulgates a regulation without considering the objectives of the authorizing legislation, it acts beyond its statutory authority. *Dixon v. United States,* 381 U.S. 68 (1965). Here the DOE has not only failed to consider the policies of the EPCA, it has violated them. This Court should not allow TECA's imprimatur to remain on that violation.

III. THE PANEL OF TECA WHICH HEARD THIS APPEAL SUBSTANTIALLY DEPARTED FROM ACCEPTED NORMS OF APPELLATE REVIEW BY PREJUDGING THE APPEAL IN THE "STRIPPER WELL LITIGATION" WHICH IS CURRENTLY PENDING BEFORE A DIFFERENT TECA PANEL.

TECA determined that decisions in the stripper well litigation were dispositive of the question whether an injection well is a "well that produced crude oil." The stripper well exemption allowed producers to charge "stripper" prices (in excess of prices permitted by DOE controls) if, under certain circumstances, the production of a given field did not exceed ten barrels per day per well. The fundamental question presented in that litigation is whether injection wells may be counted in the formula used to determine whether a property qualifies as a "stripper property."

In the appeal in the Wiggins' case, TECA declared:

> Finally, the prior decisions construing the interpretative stripper well Ruling 1974-29 to be consistent with a similar underlying statute are decisive.
>
> * * *
>
> This interpretation was approved as consistent with the language "wells that produced crude oil" in the similar statutory stripper well exemption.

TECA is in error in this statement. The stripper well litigation and the present case involve different regulations promulgated pursuant to different statutory authority.[6] The language "wells that produced crude oil" does not even appear in the statutory stripper well exemption. Furthermore, no issue regarding the consistency of the interpretation with the statute was passed on by the district court in the stripper well litigation or was before TECA on appeal.

But of much graver significance, TECA, purporting to attach controlling weight to the stripper well litigation, neglected to mention the final judgment of Chief Judge Theis in the stripper well litigation entered July 14, 1981, holding that Ruling 1974-29 is substantively invalid. That judgment, currently pending before TECA, requires that injection wells be counted for purposes of the stripper well exemption. In his final judgment in the stripper well litigation, Judge Theis, examining the DOE's rationale for concluding that only recovery wells could be considered wells that produced crude oil for purposes of the stripper well exemption, observed:

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[6] The Stripper Well Litigation deals with the Stripper Well Exemption Regulation, 10 C.F.R. § 212.54, promulgated in 1973, originally pursuant to the statutory stripper well exemption, § 406(a) of the Trans Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) (current version at 43 U.S.C. § 1651 *et seq.*), as that Regulation was specifically interpreted by the agency's Ruling 1974-29, issued in 1974. This case, on the other hand, involves the Marginal Property Rule, 10 C.F.R. §§ 212.72, 212.74, promulgated in 1979, pursuant to the EPCA, and there has been no specific agency ruling interpreting the Marginal Property Rule.

> Moreover, the record fails to disclose any basis which could serve as a rational basis for differentiating between injection and recovery wells for the purpose of this [stripper well lease] exemption. Clearly, Congress intended a narrow construction of the statute, but an arbitrary construction could not have been intended. The engineering facts disclose that an injection well is physically similar in construction to a recovery well. The costs associated with drilling and maintaining an injection well are as great or greater than costs associated with drilling or maintaining a recovery well. The only distinctions offered by the defendant are: (1) that injection wells do not actually emit hydrocarbons, and (2) the contribution to production of an individual injection well cannot be determined with precision. These are distinctions without difference. The engineering contribution of an injection well is undisputed. The water forced into the reservoir, via the injection well, provides energy pressure, displaces crude oil, and forces oil from the reservoir into the well bore of a recovery well. The fact is that but for the injection wells, such crude oil would not have been obtained. It could not be produced under known oil production methods. Whether the oil is brought out of one well bore or a different well bore simply does not matter. The fact that the contribution of an individual injection well cannot be measured does not matter. The statute provides that the exemption is to be based on the production of the lease. Whether any one injection well contributes one barrel of oil per day or 100 barrels of oil per day matters no more than whether a given recovery well recovers one barrel of oil per day or 100

> barrels of oil per day. Only the total number of wells is of importance. The problems which the Congress envisioned are equally addressed by allowing injection wells to be included in the well count as by allowing recovery wells to be so counted. *In fact, the DOE's position would be as defensible if it had excluded recovery wells and included only injection wells in the well count on secondary recovery projects.* Excluding injection wells seems as nonsensical as would be a decision to exclude fathers from a count of parents. (emphasis added).

Energy Reserves Group, Inc. v. DOE, 520 F.Supp. at 1272-73 (D.Kan. 1981). Ruling 1974-29 has thus been invalidated. The TECA panel in the present case either overlooked this decision or ignored it. If the panel was aware of this decision, one can only assume that the panel has attempted to prejudge or influence the outcome of that litigation. Either of these actions shows considerable disregard for the proper function of the panel which has been appointed to hear the stripper well litigation.

It would be a dangerous precedent to allow an agency to rely on an invalid ruling as the basis for construing a term used in a different regulatory context; and an even more dangerous precedent to allow one panel of an intermediate appellate court to influence an appeal pending before a different panel.

CONCLUSION

TECA has entered judgment in an appeal over which it had no subject matter jurisdiction. It announced unsound and unprecedented rules for the construction of administrative regulations. And one panel of TECA has acted to influence the appeal of a case pending before a different panel of that court.

To limit TECA to an exercise of its congressionally authorized jurisdiction, to prevent other courts from following the ill-conceived approach to regulatory construction followed by TECA, and to limit an appellate panel to a proper exercise of its authority, this Court should grant this petition, summarily vacate the judgment of TECA, and, if it believes such a course to be in the best interests of fairness, remand the case to the district court with instructions to vacate its judgment and enter a fresh judgment from which Respondents, if they desire, may perfect a timely appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States was sent by U.S. Mail, postage prepaid, on this the 23rd day of December, 1981, to the following counsel of record for Respondents:

Alice Daniel
Assistant Attorney General
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A. B. Conant, Jr.

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

WIGGINS BROTHERS, INC., ET AL.,
Plaintiffs,
v.
DEPARTMENT OF ENERGY, ET AL.,
Defendants.

CIVIL ACTION NO. CA-5-79-144

MEMORANDUM

This suit is an action challenging the Department of Energy's ability to attach its unexpressed but intended meaning to a regulation promulgated under the Department of Energy's rule making authority. The plaintiffs are property owners in Cochran County, Texas who claim that their oil producing property is entitled to treatment as marginal property under Department of Energy rules. The Department of Energy maintains, however, that the plaintiffs' property is not marginal property and that therefore the plaintiffs are not entitled to the price allowances made for oil produced on marginal property. This difference of opinion concerns the definition of the phrase "wells that produced crude oil" and this court is called upon to construe and declare the meaning of that phrase. The action is now before the court on cross motions for summary judgment and the defendants' motion to dismiss.

The facts in this case are fairly simple and for the most part have been stipulated. The parties have agreed that under the plaintiffs definition of the phrase "wells that produced crude oil", the Cochran County property is marginal property. On the other hand, the parties have also agreed that if the Department of Energy's definition is proper the Cochran County property is not marginal property. Additionally, the property has been certified as marginal property by the plaintiffs effective June 1, 1979.

The reason there is a conflict over the proper classification for the plaintiffs' property lies in the Marginal Property Rule itself. Appearing at 10 C.F.R. § 212.72, the rule was promulgated in 1979, with the purpose of regulating the price of crude oil produced from marginal property. Marginal property is defined as property whose average daily production per well in 1978 did not exceed specified maximums at various completion depths. Average daily production is defined as the total production of crude oil produced from a property, divided by 365 times the number of wells that produced crude oil from the property in 1978. Unfortunately, the body of the rule does not define "wells that produced crude oil" or "well" and the parties to this suit are claiming differing definitions to these terms.

The plaintiffs assert that a well that produces crude oil is any well that assists in the production of crude oil. Under their definition of the regulatory term, recovery wells as well as injection wells would be included in the definition of "wells that produced crude oil." The Department of Energy adopts the position that only recovery wells are included in the phrase "wells that produced crude oil."

For the purposes of this opinion, recovery wells can be described as wells from which crude oil actually flows. Injection wells can be described as wells through which substances are forced into the subsurface. The purpose of this injection procedure is to increase pressure in subterranean petroleum reservoirs forcing more crude oil to the surface through recovery wells.

Before the court can consider whether it may construe the disputed terms, the defendants' motion to dismiss for failure to state a claim upon which relief can be granted must be considered. The Department of Energy asks that the complaint be dismissed because, they contend, it impermissibily asks the court to rewrite the Marginal Property Rule to include the counting of injection wells. In support of this argument the Department of Energy states that a court may not rewrite an administrative regulation nor may it invalidate one part and allow the remaining parts to stand. While the court is in agreement with this statement of the law, it does not find it applicable in this case. The court does not perceive that the plaintiffs seek to have any portion of the Marginal Property Rule struck down or expanded. Rather, it appears to the court that they only seek to have a portion of the rule defined in order to avoid possible civil and criminal sanctions. Since the terms they seek to have defined are not defined within the body of the regulation, this court does not find that it is being asked to impermissibly rewrite or strike down any portion of the regulation. Accordingly, the motion to dismiss is denied.

Both parties have also filed motions for summary judgment and while the parties have differed in their approach to resolution of this case upon summary judgment they basically argue the same issue. That issue being a definition of "wells that produced crude oil." The plaintffs go directly to the dispute and simply ask the court to construe the term and give the regulation its plain meaning. On the other hand, the Department of Energy has colored the question before the court as one of procedural and substantive validity. Nevertheless, the court is of the opinion that the proper resolution of this case requires the court to construe the words "wells that produced crude oil" and that after that determination is made, summary judgment will be proper.

The Department of Energy contends that it is clear in the body of the regulation that they did not intend to count injection wells when enumerating "wells that produced crude oil." In support of this position the Department of Energy contends that the plaintiffs have not even attempted to dispute the fact that their present position has been the definitive agency position since Ruling 1974-29, a 1974 Department of Energy regulation dealing with stripper wells. Moreover, the Department of Energy states that it was abundantly clear in the Preamble to the Marginal Property Rule published in the Federal Register that the Department of Energy did not intend to include injection wells as "wells that produce crude oil." The Department of Energy has failed, however, to show this court precisely where in the regulation that one could turn, to know their intended meaning. Contending that they have long held their present position and pointing to the Preamble, which does not appear in the Code of Federal Regulations, does not indicate to this court that an individual subject to regulations could operate free from fear of civil and criminal sanctions if he were to be guided only by the rules appearing in the Code of Federal Regulations. Further, it appears to the court that absent the definition an individual could violate the intended but unexpressed terms of the regulation. Such an effect cannot be condoned because agency regulations must be reasonably apprehensible to individuals subject to regulation. *Tenneco v. Federal Energy Administration,* 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979).

The determination that the Department of Energy has not sufficiently expressed itself does not resolve the issue before the court. The question is still one of construction and in this regard the court has considered whether the term is ambiguous. Both parties have asserted that the term is unambiguous and that the court should give it its plain meaning.[1] Unfortunately, the parties disagree regarding that plain meaning.

In the eyes of the court this difference of opinion raises a separate question whether the two parties claiming differing meanings to the same word can create ambiguity themselves or whether the words of the regulation itself must reflect the ambiguity. The court is mindful, however, that parties should not be allowed to refer to extrinsic aids in order to create ambiguity but only to resolve it. 2A SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.04 (3d ed. 1973). Accordingly, it is the duty of this court to determine first if the words "wells that produced crude oil" have a plain meaning and then, only if they don't, to allow in extrinsic aids to resolve any ambiguity. Moreover, the court is of the opinion that since the term used is used in a regulatory framework it must be viewed from an industry standpoint. The court reaches this conclusion because the term has no relevant meaning outside the industry and the regulations subject only those within the industry to their control.

In investigating the plain meaning of "wells that produced crude oil" the court has examined the transcripts of two hearings held before this court on February 26, 1979 and before Judge Robert M. Hill on April 7, 1978, which the parties have made part of the record in this case. Additionally the court has reviewed other materials submitted to the court by the parties in support of their motions. After a careful and thorough reading of these transcripts and the other materials the court has reached the conclusion that the regulatory term has a plain meaning and that plain meaning would include the counting of injection wells. At several points throughout the transcripts the petroleum experts examined made it clear that injection wells are normally counted as such. (April 7, 1978 Transcript pp. 13-16, 35, 63-65; February 26, 1979 Transcript pp. 72-73). While the court is aware that the Department of Energy would argue a contrary reading the court finds that the portions of the transcripts that the Department directs the court to examine not persuasive. The Department of Energy seeks to persuade the court that the dichotomy drawn between "producing wells" and "injection wells" in the transcripts is the same one that exists between "wells that produced crude oil" and "injection wells." The court does not find that argument accurate and instead is of the opinion that the terms "producing wells" and "wells that produced crude oil" cannot be equated with each other. The general context of the transcripts leads the court to this conclusion as well as specific testimony within the transcripts that establishes that a hydraulic relationship exists between injection and recovery wells and with the absence of one or the other there would be no production in a secondary recovery unit. This testimony evidences the clear interdependence of the wells upon each other in order to produce crude oil.

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[1] Alternatively, the Department of Energy has asserted that the term is ambiguous. The court understands the Department to take this position in the event the court should rule adversely to it. The reason for this assertion is because they would like the court to consider the regulation's history in construing the regulation if it is ambiguous. How the court could consider this evidence only after it has ruled, however, was not indicated to the court.

Moreover, the court has considered the treatment given injection wells by other energy regulatory bodies. In examining what other regulatory bodies have done the court is cognizant that their interpretation would not be binding upon the Department of Energy in promulgating its rules, but the court does believe that other agency and commission interpretations would be illustrative of industry usage. The Texas Railroad Commission appears to consider injection wells as wells that produce crude oil by allowing the counting of injection wells in the determination of production allowables. Similarly the Commission of Conservation of Louisiana and the Oil Conservation Commission of New Mexico provide for the counting of injection wells in calculating allowables. Further, the United States Department of Interior has recognized the counting of injection wells as wells that produce crude oil in allocating royalties on leased public lands. *See Marathon Oil Co. v. Kleppe,* 556 F.2d 982, 985 (10th Cir. 1977). From the foregoing it is clear to the court that producers subject to regulation from these agencies would normally believe that the plain meaning of the words "wells that produced crude oil" would include injection wells.

The court is aware that the conclusion it reaches today is contrary to the intent of the Department of Energy expressed in the Preamble to the rule and published in the Federal Register. This regulatory history is relevant but since the court is of the opinion that "wells that produced crude oil" has a plain or unambiguous meaning the court chooses to disregard it in favor of the plain meaning. This decision is made on a basis that language of a regulation must reasonably bear its intended meaning and a court may not sanction a regulation that was intended but never enacted. *Tenneco Oil Co. v. Federal Energy Administration,* 613 F.2d 298, 303 (Temp. Emer. Ct. App. 1979); *Diamond Roofing v. Occupational Safety & Health Review Commission,* 528 F.2d 645, 649 (5th Cir. 1976). Moreover, fundamental fairness requires that when one may become subject to civil or criminal sanctions the language creating that possibility must adequately express it. *Longview Refining Co. v. Shore,* 554 F.2d 1006, 1014 n.20 (Temp. Emer. Ct. App.) *cert. denied,* 434 U.S. 836. Here, the Department of Energy has failed to adequately express their intention and therefore the plain meaning of the words must control.

Accordingly the court declares and construes that injection wells are included within the term "wells that produced crude oil." The plaintiffs' motion for summary judgment is granted and the defendants' motions for summary judgment and to dismiss are denied.

A judgment will be entered in accordance with the above and the Department of Energy is hereby enjoined from excluding the counting of injection wells in the application of the Marginal Property Rule to the plaintiffs' property.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 23rd day of July, 1980.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

WIGGINS BROTHERS, INC., ET AL.,

Plaintiffs,

v.

DEPARTMENT OF ENERGY, ET AL.,

Defendants.

CIVIL ACTION NO. CA-5-79-144

JUDGMENT

This action came on for hearing before the Court, Honorable Halbert O. Woodward, Chief Judge, presiding on cross motions for summary judgment and the defendants' motion to dismiss. The issues before the court having been duly heard, the court grants the plaintiffs' motion for summary judgment and construes and declares that injection wells may be counted as "wells that produced crude oil" under 10 C.F.R. § 212.72.

Additionally the Department of Energy is henceforth enjoined from excluding the counting of injection wells in the application of the Marginal Property Rule to the plaintiffs' property.

The defendants' motion for summary judgment and motion to dismiss are denied.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 23rd day of July, 1980.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-53

No. 5-57

WIGGINS BROTHERS, INC., ET AL.,
PLAINTIFFS-APPELLEES

v.

DEPARTMENT OF ENERGY, AND
JAMES B. EDWARDS, SECRETARY OF ENERGY,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Northern District of Texas
Lubbock Division

(Civ. CAC-5-79-144)

(Argued: January 20, 1981 Decided: October 14, 1981)

JOHN P. MCKENNA, Department of Energy, Washington, D.C., with whom Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice, Nancy C. Crisman, Frank W. Krogh and Samuel Soopper, Office of General Counsel, Department of Energy, Washington, D.C. were on the brief for Defendants-Appellants.

A. B. CONANT, JR., of Shank, Irwin, Conant, Williamson & Grevelle, Dallas, Texas with whom Karen S. Bedell and Richard L. Allen were on the brief for Plaintiffs-Appellees.

David J. Beck, Ronald D. Secrest, Fulbright & Jaworski, Houston, Texas, for Exxon Corporation, *Amicus Curiae*.

Before HOFFMAN, INGRAHAM and BECKER, Judges.

BECKER, Judge.

THE RECORD ON APPEAL

The massive record filed in this Court (with disparate typed numbers and mechanically stamped numbers, which later are used as page references, all inclusive cited with zeros omitted) includes the following:

A. "Record on Appeal — Pleadings File" (R.) in two volumes with pages 1-336 (000001-000336) in Volume 1, and pages 337-628 (000337-000628) in Volume 2;

B. "Record on Appeal — Administrative Record" in five volumes, with pages 1-79 in Volume 3, pages 80-170 in Volume 4, pages 171-601 in Volume 5, pages 602-1051 in Volume 6, and pages 1052-1614 in Volume 7;

C. Joint Appendix (J.A.), pages 108-628; and

D. Exhibits A, B, C and D submitted in this Court November 4, 1980, under seal by Exxon Corporation, *Amicus Curiae*. These exhibits purport to be a memorandum dated September 20, 1974, and copies of depositions and deposition exhibits taken by plaintiffs in this case, in the multidistrict stripper well litigation in the District of Kansas entitled *In Re: Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378, as follows:

1. Exhibit A, Deposition of George V. Biondi taken September 10, 1980;
2. Exhibit B, Deposition of William N. Walker taken September 11, 1980;
3. Exhibit C, Deposition of Linda Elizabeth Buck taken September 10, 1980; and
4. Exhibit D, Memorandum dated September 20, 1974, to John Vernon, Associate Assistant Administrator for Fuels Management, from Randall B.

> Alldrodge, through Edmund Winterbottom, Manager, Crude Oil, Refinery Yield, Petroleum Feedstocks, discussing effects of excluding and including injection wells in the well count under the stripper well litigation.

All deponents were lawyers formerly employed by one or more predecessors of the Department of Energy (DOE) before the issuance of the stripper well regulations and Ruling 1974-29. Biondi and Buck were subordinate employees. Walker was general counsel for the Cost of Living Council (CLC) until January 1974, and thereafter for the Federal Energy Office (FEO) until June 1974, when he was consultant for the Federal Energy Administration (FEA) until August 1974.

These depositions were taken over objections by DOE on grounds of "professional" and attorney-client privileges.

THE JUDGMENT OF THE DISTRICT COURT

The DOE and the Secretary of Energy, defendants-appellants (appellants hereinafter), appeal from a judgment of the United States District Court for the Northern District of Texas (1) declaring that injection wells may be counted as "wells that produced crude oil" under the Marginal Property Rule, 10 C.F.R. 212.72 (as amended effective June 1, 1979), and (2) enjoining the DOE "from excluding the counting of injection wells in the application of the Marginal Property Rule to the plaintiffs' property" (J.A. 273).

The judgment, from which this appeal was taken, was entered July 23, 1980 and was accompanied by a Memorandum containing findings of fact and conclusions of law (J.A. 274-279).

The issues were heard in the District Court on cross motions for summary judgment described hereinafter. The judgment for the plaintiffs-appellees (appellees hereinafter) (J.A. 273) was entered on the grant of appellees' motion for summary judgment (J.A. 108). Appellants' motion for summary judgment or in the alternative to dismiss (J.A. 137) was denied (J.A. 273).

DECISION

We reverse the judgment in favor of the appellees and direct entry of an order for appellants denying appellees' motion for summary judgment, and remand the action to the District Court for further proceeding consistent with this opinion.

The summary of the material facts and the reasons for this decision follow.

The Reasoning of the District Court

The reasoning of the District Court is set forth in its memorandum containing its findings of fact and conclusions of law (J.A. 274-279) as follows:

> This suit is an action challenging the Department of Energy's ability to attach its unexpressed but intended meaning to a regulation promulgated under the Department of Energy's rule making authority. The plaintiffs are property owners in Cochran County, Texas who claim that their oil producing property is entitled to treatment as marginal property under Department of Energy rules. The Department of Energy maintains, however, that the plaintiffs' property is not marginal property and that therefore the plaintiffs are not entitled to the price allowances made for oil produced on marginal property. This difference of opinion concerns the definition of the phrase "wells that produced crude oil"

and this court is called upon to construe and declare the meaning of that phrase. The action is now before the court on cross motions for summary judgment and the defendants' motion to dismiss.

The facts in this case are fairly simple and for the most part have been stipulated. The parties have agreed that under the plaintiffs [sic] definition of the phrase "wells that produced crude oil", the Cochran County property is marginal property. On the other hand, the parties have also agreed that if the Department of Energy's definition is proper the Cochran County property is not marginal property. Additionally, the property has been certified as marginal property by the plaintiffs effective June 1, 1979.

The reason there is a conflict over the proper classification for the plaintiffs' property lies in the Marginal Property Rule itself. Appearing at 10 C.F.R. § 212.72, the rule was promulgated in 1979, with the purpose of regulating the price of crude oil produced from marginal property. Marginal property is defined as property whose average daily production per well in 1978 did not exceed specified maximums at various completion depths. Average daily production is defined as the total production of crude oil produced from a property, divided by 365 times the number of wells that produced crude oil from the property in 1978. Unfortunately, the body of the rule does not define "wells that produced crude oil" or "well" and the parties to this suit are claiming differing definitions to these terms.

The plaintiffs assert that a well that produces crude oil is any well that assists in the production of crude oil. Under their definition of the regulatory term, recovery wells as well as injection wells would be included in the definition of "wells that produced crude oil." The Department on Energy adopts the position that only recovery wells are included in the phrase "wells that produced crude oil."

For the purposes of this opinion, recovery wells can be described as wells from which crude oil actually flows. Injection wells can be described as wells through which substances are forced into the subsurface. The purpose of this injection procedure is to increase pressure in subterranean petroleum reservoirs forcing more crude oil to the surface through recovery wells.

Before the court can consider whether it may construe the disputed terms, the defendants' motion to dismiss for failure to state a claim upon which relief can be granted must be considered. The Department of Energy asks that the complaint be dismissed because, they contend, it impermissibly asks the court to rewrite the Marginal Property Rule to include the counting of injection wells. In support of this argument the Department of Energy states that a court may not rewrite an administrative regulation nor may it invalidate one part and allow the remaining parts to stand. While the court is in agreement with this statement of the law, it does not find it applicable in this case. The court does not perceive that the plaintiffs seek to have any portion of the Marginal Property Rule struck down or expanded. Rather, it appears to the court that they only seek to have a portion of the rule defined in order to avoid possible civil and criminal sanctions. Since the terms they seek to have defined are not defined within the body of the regulation, this court does not find that it is being asked to impermissibly rewrite or strike down any portion of the regulation. Accordingly, the motion to dismiss is denied.

Both parties have also filed motions for summary judgment and while the parties have differed in their approach to resolution of this case upon summary judgment they basically argue the same issue. That issue being a definition of "wells that produced crude oil." The plaintiffs go directly to the dispute and simply ask the court to construe the term and give the regulation its plain meaning. On the other hand, the Department of Energy has colored the question before the court as one of procedural and substantive validity. Nevertheless, the court is of the opinion that the proper resolution of this case requires the court to construe the words "wells that produced crude oil" and that after that determination is made, summary judgment will be proper.

The Department of Energy contends that it is clear in the body of the regulation that they did not intend to count injection wells when enumerating "wells that produced crude oil." In support of this position the Department of Energy contends that the plaintiffs have not even attempted to dispute the facts that their present position has been the definitive agency position since Ruling 1974-29, a 1974 Department of Energy regulation dealing with stripper wells. Moreover, the Department of Energy states that it was abundantly clear in the Preamble to the Marginal Property Rule published in the Federal Register that the Department of Energy did not intend to include injection wells as "wells that produced crude oil." The Department of Energy has failed, however, to show this court precisely where in the regulation that one could turn, to know their intended meaning. Contending that they have long held their present position and pointing to the Preamble, which does not appear in the Code of Federal Regulations, does not indicate to this court that an individual subject to regulations could operate free from fear of civil and criminal sanctions if he were to be guided only by the rules appearing in the Code of Federal Regulations. Further, it appears to the court that absent the definition an individual could violate the intended but unexpressed terms of the regulation. Such an effect cannot be condoned because agency regulations must be reasonably apprehensible to individuals subject to regulation. *Tenneco v. Federal Energy Administration,* 613 F.2d 298, 302 (Temp. Emer. Ct. App. 1979).

The determination that the Department of Energy has not sufficiently expressed itself does not resolve the issue before the court. The question is still one of construction and in this regard the court has considered whether the term is ambiguous. Both parties have asserted that the term is unambiguous and that the court should give it its plain meaning.[1] (Footnote [1] Alternatively, the Department of Energy has asserted that the term is ambiguous. The court understands the Department to take this position in the event the court should rule adversely to it. The reason for this assertion is because they would like the court to consider the regulation's history in construing the regulation if it is ambiguous. How the court could consider this evidence only after it has ruled, however, was not indicated to the court.) Unfortunately, the parties disagree regarding that plain meaning.

In the eyes of the court this difference of opinion raises a separate question whether the two parties claiming differing meanings to the same word can create ambiguity themselves or whether the words of the regulation itself must reflect the ambiguity. The court is mindful, however, that parties should not be allowed to refer to extrinsic aids in order to create ambiguity but only to resolve it. 2A SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.04 (3d ed. 1973). Accordingly, it is the duty of this court to determine first if the words "wells that produced crude oil" have a plain meaning and then, only if they don't, to allow extrinsic aids to resolve any ambiguity. Moreover, the court is of the opinion that since the term used is used in a regulatory framework it must be viewed from an industry standpoint. The court reaches this conclusion because the term has no relevant meaning outside the industry and the regulations subject only those within the industry to their control.

In investigating the plain meaning of "wells that produced crude oil" the court has examined the transcripts of two prior hearings held before this court on February 26, 1979 and before Judge Robert M. Hill on April 7, 1978, which the parties have made part of the record in this case. Additionally, the court has reviewed other materials submitted to the court by the parties in support of their motions. After a careful and thorough reading of these transcripts and the other materials the court has reached the conclusion that the regulatory term has a plain meaning and that the plain meaning would include the counting of injection wells. At several points throughout the transcripts the petroleum experts examined made it clear that injection wells are wells that produce crude oil and that injection wells are normally counted as such. (April 7, 1978 Transcript pp. 13-16, 35, 63-65; February 26, 1979 Transcript pp. 72-73). While the court is aware that the Department of Energy would argue a contrary reading the court finds that the portions of the transcripts that the Department directs the court to examine not persuasive. The Department of Energy seeks to persuade the court that the dichotomy drawn between "producing wells" and "injection wells" in the transcripts is the same one that exists between "wells that produced crude oil" and "injection wells." The court does not find that argument accurate and instead is of the opinion that the terms "producing wells" and "wells that produced crude oil" cannot be equated with each other. The general context of the transcripts leads the court to this conclusion as well as specific testimony within the transcripts that establishes that a hydraulic relationship exists between injection and recovery wells and the absence of one or the other there would be no production in a secondary recovery unit. This testimony evidences the clear interdependence of the wells upon each other in order to produce crude oil.

Moreover, the court has considered the treatment given injection wells by other energy regulatory bodies. In examining what other regulatory bodies have done the court is cognizant that their interpretation would not be binding upon the Department of Energy in promulgating its rules, but the court does believe that other agency and commission interpretations would be illustrative of industry usage. The Texas Railroad Commission appears to consider injection wells as wells that produce crude oil by allowing the counting of injection wells in the determination of production allowables. Similarly the Commission of Conservation of Louisiana and the Oil Conservation Commission of New Mexico provide for the counting of injection wells in calculating allowables. Further, the United States Department of Interior has recognized the counting of injection wells as wells that produce crude oil in allocating royalties on leased public lands. *See Marathon Oil Co. v. Kleppe,* 556 F.2d 982, 985 (10th Cir. 1977). From the foregoing it is clear to the court that producers subject to regulation from these agencies would normally believe that the plain meaning of the words "wells that produced crude oil" would include injection wells.

The court is aware that the conclusion it reaches today is contrary to the intent of the Department of Energy expressed in the Preamble to the rule and published in the Federal Register. This regulatory history is relevant but since the court is of the opinion that "wells that produced crude oil" has a plain or unambiguous meaning the court chooses to disregard it in favor of the plain meaning. This decision is made on a basis that language of a regulation must reasonably bear its intended meaning and a court may not sanction a regulation that was intended but never enacted. *Tenneco Oil Co. v. Federal Energy Administration,* 613 F.2d 298, 303 (Temp. Emer. Ct. App. 1979); *Diamond Roofing v. Occupational Safety & Health Review Commission,* 528 F.2d 645, 649 (5th Cir. 1976). Moreover, fundamental fairness requires that when one may become subject to civil or criminal sanctions the language creating that possibility must adequately express it. *Longview Refining Co. v. Shore,*[1] 554 F.2d 1006, 1014 n.20 (Temp. Emer. Ct. App.), *cert. denied,*

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[1] Note 20 of *Longview Refining Co. v. Shore,* 554 F.2d 1006 at 1014 (TECA 1977), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977) cited by the District Court was explained on other issues in *Dyke v. Gulf Oil Corp.,* 601 F.2d 557 (TECA 1979).

434 U.S. 836. Here, the Department of Energy has failed to adequately express their intention and therefore the plain meaning of the words must control.

Accordingly the court declares and construes that injection wells are included within the term "wells that produced crude oil." The plaintiffs' motion for summary judgment is granted and the defendants' motions for summary judgment and to dismiss are denied.

A judgment will be entered in accordance with the above and the Department of Energy is hereby enjoined from excluding the counting of injection wells in the application of the Marginal Property Rule to the plaintiffs' property. (Emphasis and footnote added.)

The Contentions of the Parties on Appeal

On appeal appellants assert the following contentions:

A. The Marginal Property Rule precludes the counting of injection wells in determining eligibility for the exemption (Appellant's Brief, 6) relying on prior decisions of this Court; and

B. The District Court's application of the "Plain Meaning" rule was clearly erroneous (Appellants' Brief, 11).

In opposition the appellees contend that:

A. The prior decisions of this Court are unapplicable (Brief of Appellees, 5); and

B. The "Plain Meaning" of the term "wells that produced crude oil" includes injection wells (Brief of Appellees, 11).

Contentions of Amicus Curiae on Appeal

The brief of *amicus curiae* Exxon attempts to support the judgment of the District Court on the same grounds relied on by the District Court and asserted by appellees, and also on additional grounds (1) contending that there are differences in this appeal and the continuing "stripper well" litigation of which *Energy Reserves Group, Inc. v. Department of Energy,* 589 F.2d 1082 (TECA 1978) and *Duncan v. Theis,* 613 F.2d 305 (TECA 1979) are a part, and (2) drawing in issue the effect of decisions of the Judicial Panel on Multidistrict Litigation in *In re The Department of Energy Stripper Well Exemption Litigation,* 472 F.Supp. 1282 (JPML 1979).

In the absence of exceptional circumstances not present in this case, *amicus curiae* cannot expand the scope of this appeal to implicate issues that were not presented by the parties. *National Commission on Egg Nutrition v. FTC,* 570 F.2d 157, at 160 (n.3) (7th Cir. 1977), *cert. denied,* 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978); *Knetsch v. U.S.,* 364 U.S. 361, 81 S.Ct. 132, 5 L.Ed.2d 128, at 134 (1960). And in the absence of exceptional circumstances, *amicus curiae* is not entitled to introduce additional evidence (particularly evidence offered in another action after entry of the judgment which is the subject of this appeal). *Petition of Oskar Tiedemann and Co.,* 289 F.2d 237 (3rd Cir. 1961). But all germane arguments of *amicus curiae* supporting the position of the appellees will be considered.

The Complaint in the District Court

In their comprehensive complaint (R. 2-11), accompanied by their motion for preliminary injunction (R. 12-15), appellees sought (a) a declaratory judgment that Ruling

1974-29, described hereinafter, and the Marginal Property Rule as limited thereby were both invalidly issued in violation of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the Federal Energy Administration Act (FEAA), 15 U.S.C. 761 *et seq.;* and (b) a declaration of the illegality of, and an injunction against the actions of the appellants for violations of rights of appellees under the Constitution of the United States.

Jurisdiction, which is not controverted, was asserted under § 5(a)(1) of the EPAA incorporating § 210(a) and § 211(a) of the Economic Stablization Act (ESA), now published as a note to 12 U.S.C. § 1904, and under 28 U.S.C. §§ 1331, 2201 and 2202.

In their complaint appellees further stated in substance the following allegations.

1. Appellees are owners of "working interests" in the C.S. Dean "A" Unit (Dean Unit), a petroleum producing property, on which secondary water injection operations were initiated in July 1966; then there were 82 active "recovery wells" and 12 injection wells; that to increase production "significantly" from the Dean Unit it was necessary to drill new wells and convert several of the (recovery) wells to water injection wells; and that during 1978 there were 94 "recovery wells" in the Dean Unit and 73 injection wells (R. 4).
2. In 1973 Congress mandated a program of price controls for domestic crude oil sales, specifically exempting crude produced from low volume "stripper oil properties" (or "stripper wells") defined as ". . . Any lease whose average daily production of [crude oil] for the preceding calendar month does not exceed ten barrels per well . . . ." § 406(a) of the Trans-Alaska Pipeline Authorization Act

(TAPAA) (current version at 43 U.S.C. § 1651 *et seq.*)[2] (R. 4).

3. In November 1973 the CLC promulgated a regulation, 6 C.F.R. 150.54(s), to implement the "stripper well" exemption which (was misquoted by appellees, but properly quoted) provided in part as follows:

> (1) *Rule.* Effective November 27, 1973, the price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt....
>
> 'Average daily production' means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of calendar days in that year times the number of wells which produced crude petroleum and petroleum condensates including natural gas liquids from that property in that year . . . .
>
> 'Stripper well lease' means a 'property' whose average daily production of crude petroleum condensates, including natural gas liquids, per

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[2] The exemption was reenacted in Section 4(e)(2)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.*, repealed for a brief time in 1975 by Section 401(b)(1) of the Energy Policy and Conservation Act, Pub.L. 94-163, and later reinstated by Section 121 of the Federal Energy Administration Amendments of 1976, Pub.L. 94-385, 15 U.S.C. § 757(i). See history in *Energy Reserves Group. Inc. v. DOE,* 589 F.2d 1082, at 1087-1091 (TECA 1978), clarified in *Duncan v. Theis,* 613 F.2d 305 (TECA 1979).

> well did not exceed 10 barrels per day during the preceding calendar year.

This regulation, with an amendment changing the qualifying period to any 12 month period after December 31, 1972, remains in effect in 10 C.F.R. § 212.54 (R. 5).

4. On December 24, 1974 the FEA, predecessor of DOE, published Ruling 1974-29 in which it was ruled that injection wells were not considered "wells" for the purpose of determining whether a property qualified for the stripper well exemption (R. 5). Ruling 1974-29, incorporated by reference in the preamble of the Marginal Property Rule published in the Federal Register, reads as follows:

> PRODUCTION WELLS FOR PURPOSES OF THE "STRIPPER WELL LEASE" EXEMPTION
>
> *Facts.* Firm P, a producer of petroleum, produced during the preceding calendar year 150,000 barrels of crude petroleum and petroleum condensates, including natural gas liquids from 40 production wells located on Property A, as defined in 10 CFR 210.32. In addition, there were five injection wells in operation on that property last year. An injection well is one which is used to inject water, air, gas, steam or other materials into the ground to assist in the recovery of crude petroleum through producing wells. Wells which formerly produced crude petroleum may be used for injection purposes, or new wells may be drilled solely for the purpose of injecting materials into oil-bearing formations and reservoirs.
>
> The average daily production per well from Property A was 10.27 barrels, based on the 40 produc-

tion wells, whereas the average daily production per well would be 9.13 barrels if 45 wells, including the 5 injection wells, were used to calculate the average daily production figure.

Issue. Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?

Ruling. No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 CFR 210.32(b) as:

The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produce crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the FEA regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of de-

> termining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the non-producing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

Ruling 1974-29 was upheld as an interpretative rule in *Energy Reserves Group, Inc. v. DOE,* 589 F.2d 1982 (TECA 1978), clarified in *Duncan v. Theis,* 613 F.2d 305 (TECA 1979).

5. On April 12, 1979 the DOE, successor to CLC and FEA, published a regulation, effective June 1, 1979, known as the "Marginal Property Rule", 44 Fed. Reg. 22010 (April 12, 1979) 10 C.F.R. 212.72,[3] which provides, in part, as follows (R. 5-6):

> 'Marginal property' means a property whose average daily production of crude oil (excluding condensate recovered in non-associated production) per well during calendar year 1978 did not exceed the number of barrels shown in the following table for the corresponding average completion depth:

[*Average completion depth in feet*]	*[Barrels per day]*
2000 or more but less than 4000	20
4000 or more but less than 6000	25
6000 or more but less than 8000	30
8000 or more	35

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[3] The Marginal Property Rule was later published with corrections that are immaterial here on April 27, 1979. 44 Fed. Reg. 25160.

6. The Marginal Property Rule also provides that a producer with properly qualifying marginal property under the rule can sell most of the crude oil from the property at upper tier prices effective June 1, 1979, and all of the crude oil at upper tier prices beginning January 1, 1980. (R. 6).

7. In the preamble of the Marginal Property Rule, DOE stated its intention to apply Ruling 1974-29 in determining whether a property qualified as a Marginal Property (R. 6; 44 Fed. Reg. 22010, *supra,* and to exclude injection wells in the count of "wells that produced crude oil". 44 Fed. Reg. 22014, *supra*).

8. Appellees' complaint states five grounds for relief (each probably unnecessarily designated serially as a "Claim For Relief", 2A *Moore's Federal Practice* ¶10.03).

9. Appellees state in a "First Claim for Relief" (R. 6-7) that:

   (1) the Marginal Property Rule "as modified by Ruling 1974-29 was not issued in accordance with applicable rulemaking procedure" for reasons (a) failure to define "well" and to exclude injection wells from that definition; (b) publication of the Marginal Property Rule without opportunity for comment from interested parties; (c) stating its intent to apply Ruling 1974-29; (d) Ruling 1974-29 was published in 1974 without prior notice or opportunity for comment and purported to define the term "well" only for purposes of the "stripper well" exemption, and in a manner contrary to the meaning of "well" in the petroleum industry, and as historically defined by state regulatory agencies, the Department of

Interior and the Internal Revenue Service; and (e) that implementation in the Marginal Property Rule of the definition of "well" in Ruling 1974-29 would substantially affect the price and appellees financially; and

(2) the Marginal Property Rule, as interpreted by DOE amends the term "well" as used in the regulations and therefore is a new "rule" as defined in the APA and has a substantial impact on individuals and businesses in the national economy; and promulgation of the Marginal Property Rule was an attempt to contravene the mandatory notice and comment statutory procedures of the APA and FEAA, and therefore is invalid.

10. Appellees state in a "Second Claim for Relief" (R. 7-8) that: (a) "Ruling 1974-29 as applied to the Marginal Property Rule is invalid for the reason that it was issued in excess of FEA's statutory authority"; (b) the definition of the term "well" in Ruling 1974-29 is contrary to the clear meaning of "well" as understood by Congress, the industry, and state and federal regulatory agencies; (c) the Marginal Property Rule does not state that injection wells may not be counted as wells that produce crude oil for purposes of the rule; (d) injection wells are an integral part of the production of crude oil from secondary recovery projects; (e) without injection wells the recovery of crude oil would be reduced and possibly cease; and (f) application of Ruling 1974-29 discourages production of domestic crude oil and therefore contravenes the EPAA.

11. Appellees state in "Third Claim for Relief" (R. 8-9) that: (a) the issuance of Ruling 1974-29 and the lim-

itation thereby of the Marginal Property Rule was arbitrary, capricious and an abuse of discretion prohibited by the APA; (b) there was no rational basis for the ruling of FEA that injection wells may not be considered to be wells for purposes of the Marginal Property Rule because these wells "are an integral part of the operation of a waterflood project space . . . [and] often incur the same drilling and maintenance costs as active recovery wells"; and (c) the limited construction of the term "well" ignores a substantial part of the cost of operating secondary recovery properties and discourages domestic crude oil production.

12. Appellees state in their "Fourth Claim for Relief" (R. 9) that: (a) their domestic crude oil producing operations are substantially less profitable because they are unable to sell the production from their Dean Unit at upper tier prices; (b) the inability of appellees to sell the production from their Dean Unit at upper tier prices is the requirement of Ruling 1974-29 as a limitation on the Marginal Property Rule; and (c) appellees have suffered legal wrongs because of the rulings issued by FEA and DOE, now enforced by DOE.

13. Appellees in their "Fifth Claim for Relief" (R. 10) summarizes its foregoing allegations and contentions.

Appellees Motion for Summary Judgment

Appellees filed a Motion for Summary Judgment "on the ground that there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law" (J.A. 108). This motion was accompanied by a verified Statement of Uncontroverted Facts and Issues of Law, under Local Rule 5.2 of the District Court (J.A. 109-115), and a Memorandum in Support of Plaintiffs' Motion for Summary Judgment (J.A. 116-133). Appellants in opposition filed a Response to Plaintiffs' Motion for Summary Judgment (J.A. 134-136). Appellants filed a Motion for Summary Judgment, or in the Alternative, Motion To Dismiss (J.A. 137), which was accompanied by a Memorandum of Law in Support of Defendants' Motion to Dismiss and Motion for Summary Judgment (J.A. 138-150) with Exhibits (J.A. 151-204). Appellees filed a Response to this latter Memorandum (J.A. 205-207) and a Supplemental Memorandum in support of Appellees' Motion for Summary Judgment (J.A. 208-216). Appellants filed a Response to the latter Appellees' Memorandum of Authorities (J.A. 217-221) with Exhibits (J.A. 222-271).

The parties stipulated and agreed that testimony (J.A. 337-513) given "in certain preliminary injunction hearings previously had before [the District] Court or courts from which the cases were transferred to this Court may be utilized or taken judicial notice of in this action" (J.A. 118).

We conclude that this testimony described in this stipulation and contained in the record (J.A. 337-513) is inadmissible and ineffective to support the contentions of the appellees contrary to the unambiguous meaning of the Marginal Property Rule, described hereinafter.

The Stipulation of the Parties In The District Court Narrowing The Issue

Despite the wide range of the claims and contentions of the appellees the crucial issue on this appeal was clearly identified in the District Court wherein it was stipulated (J.A. 118) as follows:

> "*Stipulations* — The parties have agreed in open court that (a) if injection wells are included within the regulatory term, the property in question, the C. S. Dean "A" Unit, Cochran County, Texas (herein called "the Dean Unit"), is a marginal property, (b) *if injection wells are not so included, the Dean Unit is not a marginal property . . . effective June 1, 1979.*" (Emphasis added.)

The question for decision by this Court on this appeal is simply whether, under a proper construction of the Marginal Property Rule, injection wells may be counted "as wells that produced oil".

We conclude that injection wells may not be counted as "wells that produced oil" in the application of the Marginal Property Rule; and that the summary judgment for appellees of the District Court to the contrary must be reversed, and the cause remanded for further proceedings consistent with this conclusion.

The District Court reached a conclusion that, under the Marginal Property Rule, injection wells may be counted "as wells that produced oil" for two principal reasons, namely: (1) the obvious contrary intent of DOE expressed in the preamble by reference to Ruling 1974-29 should be disregarded; and (2) without the preamble the regulation had a plain meaning that injection wells could be counted as "wells that produced oil". If either, or both, of these reasons are erroneous, the judgment of the District Court should be reversed. We conclude that both reasons given by the District Court are erroneous.

Reasons for Decision

I

The District Court was not free to disregard the obvious intention of DOE to exclude injection wells from the count of "wells that produced oil" which DOE clearly expressed (a) by including in the preamble to the Marginal Property Rule an incorporation by reference to Ruling 1974-29; (b) by including the following definition concerning "average completion depth"

> In order to determine whether a particular property qualifies as a marginal property, the producer must first calculate the property's "average completion depth" of all wells that produced crude oil on the property during the qualifying period. This calculation involves dividing the sum of the completion depths for all such wells by the number of those wells. *Injection wells and other wells that did not produce crude oil during the qualifying period may not be counted for purposes of these calculations.* (Emphasis added.) 44 Fed. Reg. 22014 (R. 151-160 at 155);

and (c) by including the following definition concerning "average daily production"

> A property's average daily production during the qualifying period must be determined in the same way as it is done for stripper well properties, and the provisions of the relevant stripper well property rulings will be applicable with respect to such computations. Accordingly, in calculating a property's average daily production, for example, *a producer may not count injection wells or other wells that did not produce crude oil during the qualifying period.* (Emphasis added.) 44 Fed. Reg. 22014 (R. 151-160 at 155).

It is well settled by decisions of this Court that the preamble to a regulation of DOE and its predecessors should be considered in construing the regulation and determining the meaning of the regulation. Part I of *UPG, Inc. v. Edwards, Secretary of DOE,* 647 F.2d 147 (TECA 1981); *Sauder v. DOE,* 648 F.2d 1341 (TECA 1981); *McWhirter v. Texaco, Inc.,* —— F.2d —— (TECA 1981); *Mountain Fuel Supply Co. v. DOE,* —— F.2d —— (TECA 1981).

In the construction of the Constitution of the United States, statutes and regulations, the federal rule permits and requires consideration of preambles in appropriate cases. For examples, the preamble to the Constitution of the United States was considered in *Dred Scott v. Sanford,* 60 U.S. 393, 19 How. 393, 15 L.Ed. 691, at 703 (1857); *M'Culloch v. Maryland,* 17 U.S. 159, 4 Wheat 316, 4 L.Ed. 579, at 601 (1819); and in other cases. *Cf.* 16 Am.Jur.2d, *Constitutional Law,* § 87, 414.

A rule that, in construing a regulation of DOE, excludes consideration of materials not in the codification of the regulation in the Code of Federal Regulations is erroneous because: (1) the rule is contrary to the requirement of the Federal Register Act, § 1507, Title 44 U.S.C. that the publication of the regulation be judicially noticed; (2) the rule is contrary to the necessity of considering the separate underlying statute; and (3) the rule is contrary to the necessity to consider the legislative history of the underlying statute in appropriate cases. 2A Sands, *Sutherland Statutory Construction* (4th ed.) Chapter 48, §§ 48.01-48.20, 181-227.

Further, there is no support for the view that, under federal rules of construction of statutes and legislative regulations, definitions in a preamble may be ignored. The rule is contrary to this view. *Western Union Telegraph Co. v. Lenroot,* 323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414, at 423 (1944). 1A Sands, *Sutherland Statutory Construction* (4th ed.), § 20.08, 59-61; 2A Sands, *Sutherland Statutory Construction* (4th ed.) § 47.04, 76-80.

Appellees' reliance on Sands, *Sutherland Statutory Construction* (3rd ed.), § 46.04 (now § 47.04 in the 4th edition), is misplaced. While noting some undesirable variations in statutory construction, the treatise cited clearly and strongly supports reference to the preamble as one of the means of statutory construction.

Furthermore, in the absence of exceptional circumstances not present in this action, the interpretation given by an administrative agency to regulations promulgated by it are entitled to deference unless it is plainly erroneous or inconsistent with the regulation. *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, at 413-414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945); *Cf. Udall v. Tallman,* 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), *reh. denied,* 380 U.S. 989, 85 S.Ct. 1325, 14 L.Ed.2d 283 (1965), involving construction of a statute by an administrative agency possessing expertise. 2 Davis, *Administrative Law Treatise* (2d ed.), § 7:22, 105-108.

Appellees contend and the District Court concludes that failure to publish the preamble in the Code of Federal Regulations (C.F.R.) is significant as a reason for disregarding the preamble. This conclusion is clearly erroneous.

The C.F.R. in each volume contains an accurate *"Explanation"* of the legal status of the C.F.R. and the Federal Register (as in Volume 10, *Energy,* Parts 200 to 499, revised as of January 1, 1980) which is in part as follows:

> The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas

> subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.
>
> * * * *
>
> LEGAL STATUS
>
> *The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507).* The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).
>
> HOW TO USE THE CODE OF FEDERAL REGULATIONS
>
> The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule. (Emphasis added.)
>
> * * * *

The C.F.R. is part of the Federal Register system provided by the Federal Register Act, 44 U.S.C. §§ 1501-1511 inclusive, supplemented by 1 C.F.R. §§ 1.1-51.12 inclusive, *See* 2 Mezines, Stein, and Gruff, *Administrative Law* §§ 7.02[1] and 8.01.

The failure to publish the preamble in C.F.R. may be important in a proceeding to impose criminal penalties based on criminal intent. *National Helium Corp. v. FEA*, 569 F.2d 1137, at 1145 (TECA 1978). But the failure does not support appellees in this civil proceeding.

Finally, the prior decisions construing the interpretative stripper well Ruling 1974-29 to be consistent with a similar underlying statute are decisive. *Energy Reserves Group, Inc. v. DOE*, 589 F.2d 1082 (TECA 1978), clarified in *Duncan v. Theis*, 613 F.2d 305 (TECA 1979).

II

The second reason given by the District Court for its judgment was that, disregarding the preamble, the remainder of the regulation supported the judgment under the "plain meaning" rule of construction. We find this application of the plain meaning rule to be error whether the preamble was considered or disregarded.

The critical phrase "wells that produced oil" had earlier acquired a meaning, that excluded injection wells by administrative interpretation in Ruling 1974-29. This interpretation was approved as consistent with the language "wells that produced oil" in the similar statutory stripper well exemption. *Energy Reserves Group, Inc. v. DOE,* 589 F.2d 1082 at 1092 (TECA 1978), clarified in *Duncan v. Theis,* 613 F.2d 305 (TECA 1979).

In reaching a conclusion that the Marginal Property Rule (disregarding the preamble) had a plain meaning contrary to the preamble to the Marginal Property Rule, contrary to the interpretation by DOE and contrary to the interpretation by this Court in the stripper well exemption cases, the District Court relied on extrinsic evidence consisting of selected portions of oral testimony by witnesses (much of which was consistent with the preamble) (J.A. 337-513) from the industry before another judge (J.A. 277-278), and practices of state regulatory bodies and the Department of Interior in calculating allowables and royalties (J.A. 278). The contrary selected oral testimony (J.A. 277-278) was not admissible to rebut the preamble of the Marginal Property Rule, the interpretation of DOE, and the interpretation of this Court. In constructing and reviewing administrative regulations of DOE, and its predecessors, the District Court must focus on "how the FEA, not the refiners, interpreted the regulations . . . ."

Standard Oil Co. v. DOE, 596 F.2d 1029, at 1067 (TECA 1978).

The exclusion of injection wells in determining the average daily production of crude oil is consistent with even the general definitions recognized by the industry and published in Williams and Meyers, *Manual of Oil and Gas Terms,* 4th ed. 1976.

> *Injection Well* (at page 291)
>
> A well employed for the introduction into an underground stratum of water or gas under pressure. Injection wells are employed for the disposal of salt water produced with oil. They are also employed in a pressure maintenance, secondary recovery or recycling operation to introduce a fluid into the producing formation to maintain underground pressures which would otherwise be reduced by virtue of the production of oil and/or gas. *Syn.:* Input well.
>
> An injection well is treated for Federal income tax purposes as part of production, and costs of drilling may be capitalized or deducted as intangibles. Breeding and Burton, *Income Taxation of Natural Resources* ¶¶ 14.13, 15.21 (1971).
>
> When a sliding scale (step-scale) royalty is based on average daily production per well, the lease or unit agreement involved should be specific as to which (if any) injection wells may be counted as producing wells for the purposes of determining average daily production per well. See Marathon Oil Co., 81 I.D. 447, 16 IBLA 298, GFC (O&G) 62 (1974); Atlantic Richfield Co., Marathon Oil Co., 81 I.D. 457, 16 IBLA 329, GFS (O&G) 63 (1974). The decisions in these cases were set aside in Marathon Oil Co. v. Kleppe, 407 F.Supp. 1301 (D. Wyo. 1975).
>
> *Producing Well* (at pages 453 and 454)
>
> A well that produces oil or gas. It is not a term of art, for it may mean a well that produces in paying

> quantities (that is, a well for which proceeds from production exceed operating expenses) or it may mean a well that produces in any quantity whatsoever. The term does not include a well that has discovered oil or gas but does not produce either. Rogers v. Osborn, 152 Tex. 540, 261 S.W.2d 311, 2 *O. & G. R.* 1439 (1953); Holchak v. Clark, 284 S.W.2d 399, 5 *O. & G. R.* 595 (Tex. Civ. App. 1955, error ref'd). When the meaning of the term arises in connection with the termination of an interest created for a term of years and so long thereafter as oil or gas is produced, it is usually held that producing well means a well producing in paying quantities. See Alsip's Adm'r v. Onstott, 283 S.W.2d 711, 5 *O. & G. R.* 334 (Ky. 1955).
>
> See PRODUCTION IN PAYING QUANTITIES; WELL.
>
> In Aeroplane Oil & Refining Co. v. Disch, 203 Ky. 561, 262 S.W. 939 (1924), the court declared that it was shown by proof that oil men do not consider a well a producing well unless it produces at least five barrels a day, but in construing an instrument that contained this term, *it applied the meaning of the term in ordinary speech, that is, a well that is producing some oil.* (Emphasis added.)

The reported practices and interpretations of state regulatory commissions and the Department of Interior for other purposes, relied on by the District Court, are not effective to rebut the contrary meaning and administrative interpretation of the Marginal Property Rule by DOE. This was expressly held in *Energy Reserves Group, Inc. v. DOE,* 589 F.2d 1082, at 1098-1099 (TECA 1978), clarified in *Duncan v. Theis,* 613 F.2d 305 (TECA 1979).

Remaining Issues

The record in this case is probably sufficient to permit consideration of the propriety of the denial by the District Court of the motion of appellant DOE for summary judgment or in the alternative to dismiss (J.A. 137). The District Court, however, did not pass on the remaining issues in its memorandum of findings of fact and conclusions of law. And the remaining issues were not briefed and argued in this appeal. Therefore they will not be decided now. Without suggesting that there is any merit in appellees' remaining contentions, the action will be remanded for further proceedings consistent with this opinion.

Conclusion

For the foregoing reasons, the judgment of the District Court, including but not limited to the grant of injunctive and declaratory relief, is reversed and the action is remanded for further proceedings consistent with this opinion.

In No. 5-53 appellants filed a premature notice of appeal while appellants' timely motion under Rule 59, F.R.Civ.P., for reconsideration (to alter and amend the judgment) was pending. It is hereby

ORDERED that this premature appeal be, and it is hereby, dismissed.

44 FED. REG. 25160

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) is adopting amendments to the Mandatory Petroleum Price Regulations designed to provide additional incentives for increased production of domestic crude oil.

One of these amendments will apply to crude oil produced and sold from "marginal properties" and, as of the effective date of the amendment, most of the crude oil produced and sold from these properties will be eligible for upper tier ceiling prices with the remainder of such crude oil to be released to upper tier prices effective January 1, 1980.

Under another of these amendments, producers will be given an opportunity for each domestic property on a one-time basis to elect to (1) eliminate any existing current cumulative deficiencies, and (2) update the base production control levels (BPCL's), as of the effective date of this amendment. Thereafter, the amendments provide for adjustments to these BPCL's so as to provide each month for a more realistic opportunity to release a portion of the properties' lower tier crude oil production to the upper tier. These amendments will apply to all properties except those qualifying as "marginal," for which special procedures are provided.

Finally, the ERA is continuing this rulemaking proceeding to consider whether to adopt any of the other proposals currently under consideration in this proceeding, including (but not limited to), elimination of the current 21 cent per barrel entitlement penalty on uncontrolled crude oil.

I. BACKGROUND

A. Third Stage of EPCA Implementing Regulations

On May 4, 1976, the Federal Energy Administration (FEA) issued a Notice of Proposed Rulemaking and Public Hearing (41 FR 18873, May 7, 1976) to consider whether additional incentives, beyond the lower tier and upper tier ceiling price levels (including adjustments for inflation and to provide a production incentive) that had been adopted pursuant to the pricing policy of the Energy Policy and Conservation Act (EPCA, Pub. L. 94-163), would be needed to maintain or increase production volumes in any classifications of domestic crude oil. At that time any amendment to provide such incentives by increasing the composite price would have been required to be submitted to Congress pursuant to the review procedures established by Section 551 of the EPCA for composite price adjustments in excess of the adjustments for inflation and as a production incentive, which were then permitted without such review.

The FEA at that time proposed additional incentives with respect to each of the three categories specified in the Emergency Petroleum Allocation Act, as amended (EPAA, Pub. L. 93-159), *i.e.,* the discovery and development of high cost and high risk properties, the application of enhanced recovery techniques and sustaining production from marginal wells.

Final action on any of the proposals in that proceeding was ultimately deferred because of the increased composite price flexibility afforded by the Energy Conservation and Production Act (ECPA, Pub. L. 94-385), which was enacted on August 14, 1976, during the pendency of the proceeding. The ECPA eliminated the 3 percent limitation on production incentive adjustments, and identified express priorities for treatment under that increased pricing flexibility.

B. The Energy Conservation and Production Act

The ECPA amended the EPAA in several significant respects regarding crude oil prices. Specifically, the ECPA removed the 3 percent limitation on adjustments to the composite price to provide a production incentive, so that only the overall limitation of 10 percent on the combined effect of adjustments to reflect inflation and as a production incentive was retained. The EPCA had limited the annual rate of adjustment to the rate of inflation (as measured by the first revision of the GNP deflator) plus not more than 3 percent as a production incentive, with the total rate of adjustment not to exceed 10 percent per year. In contrast, the ECPA permitted increased pricing flexibility of up to a full 10 percent per year, with the result that composite price increases as a production incentive could exceed 3 percent if the rate of inflation were below 7 percent.

This increased pricing flexibility provided a means to encourage domestic production, and the ECPA included as express priorities in this regard the application of *bona fide* tertiary recovery techniques and adjustments to certain gravity price differentials that were associated at that time with heavy crude oil. (Action has since been taken to accomplish adjustments to gravity price differentials and to provide additional price incentives for *bona fide* tertiary enhanced recovery techniques.)

The ECPA provided that, effective September 1, 1976, crude oil produced and sold from stripper well properties is exempt from first sale price controls. The statutory exemption for crude oil produced and sold from stripper well properties (first in the EPAA and later in the ECPA) was intended by Congress to provide an incentive to maintain domestic crude oil production from marginal producing well properties. Under the current ECPA exemption for stripper well properties. Congress set the qualifying limits for the exemption at production of crude oil at levels of 10 barrels or less per well per day during any preceding consecutive 12-month period beginning after December 31, 1972. Although such crude oil is statutorily exempt from first sale price controls, actual volumes of stripper well crude oil have been reported to the DOE, given an imputed price (as determined under Section 121 of the ECPA), and included in the calculations to determine compliance with the actual weighted average first sale price restrictions contained in the EPAA. Effective June 1, 1979, the domestic crude oil first sale price restrictions contained in Section 8 of the EPAA terminate under current law.

II. GENERAL PRINCIPLES UNDERLYING CONSIDERATION OF THE PROPOSALS

We have determined that the examination, begun by the FEA, of additional production incentives for domestic crude oil, should be continued, particiularly with respect to domestic crude oil volumes the production of which may be marginally economic at currently controlled price levels. Accordingly, on November 2, 1978, we proposed several amendments (and variations thereof) to the price regulations to provide such production incentives for domestic crude oil. Public hearings on these proposals were held in Austin, Texas on January 9, 1979, and in Los Angeles, California on January 11, 1979. After consideration of all the comments received in connection with this proceeding, and on the basis of data now available to us, we have decided to adopt certain amendments to the price regulations. We will continue our examination of whether additional price incentives should be proposed with respect to first sales of domestic crude oil.

An important element of DOE policy is the promotion of domestic crude oil production, and thus of national energy self-sufficiency, in a manner compatible with the specific policies of the EPAA and overall national policies generally. In this connection, we have considered whether crude oil price levels calculated in accordance with DOE regulations, particularly lower tier crude oil price levels, may be resulting in the premature abandonment of domestic crude oil producing properties that would be self-sustaining in the absence of controls or at higher price levels. Also, we are aware that the present crude oil price control system may be operating to discourage producers from undertaking actions that would increase crude oil production. Allowing production to decline to levels which would qualify for stripper well property treatment might result in more favorable regulatory treatment than if production efforts were maintained or increased.

In order to prevent the crude oil price regulations from operating in a fashion that frustrates the goal of maximizing domestic crude oil production and to address the potential problems discussed above, we have adopted the amendments described below. These amendments will permit an increase in the price of some volumes of crude oil produced and sold from certain properties, to upper tier ceiling price levels.

Our consideration of the proposals set forth in the November 2 Notice has been guided by several factors. We have endeavored to determine whether and to what extent their adoption would be likely to result in increased levels of production above those that would otherwise occur in the absence of their adoption. In addition, we have determined that these amendments result in prices and classifications that are both administratively feasible and consistent with our goal of moving domestic crude oil production toward replacement cost, tempered by concerns for inflationary impacts on the national economy.

III. ALTERNATIVE AMENDMENTS PROPOSED

A. Alternative Proposal No. 1: Market Prices for Certain Production From "Marginal" Properties

This proposal was designed to maintain marginal domestic crude oil production with price incentives that more closely correspond to costs of production at different well depths. It was our intention to determine whether production costs associated with domestic crude oil significantly increase in proportion to the depth of that production. Accordingly, this alternative proposed to establish a new classification of domestic crude oil produced from "marginal" properties, called "market tier" crude oil, which would immediately be eligible to be sold without regard to the current ceiling prices applicable to first sales of lower tier and upper tier crude oil.

Under this proposal, a "marginal property" would be assigned a "Marginal Base Production Control Level," and any volumes of current production and sale in excess of the Marginal BPCL could be sold at market clearing prices. (All other volumes of current production and sale equal to or less than the Marginal BPCL would be classified as either lower tier or upper tier crude oil, as more fully explained in the November 2 Notice.) Additionally, an imputed decline rate would operate continuously to decrease the property's Marginal BPCL so as to provide an additional incentive to maintain or increase production levels.

We have decided that effective June 1, 1979, the BPCL for a marginal property will be equal to 20 percent of the average monthly production and sale of old crude oil from the property concerned during calendar year 1978. Effective January 1, 1980, the BPCL for any marginal property will be reduced to zero. Other than the complete elimination of the BPCL effective January 1, 1980, there will be no BPCL adjustments for marginal properties.

B. Alternative Proposal No. 2: Updating of BPCL for All Properties

Under this alternative we proposed to provide producers with an option, in addition to the existing BPCL options to establish a BPCL for a particular property based on the average monthly volumes of old crude oil produced and sold from the property in 1977. For each property the producer would be permitted to eliminate any current cumulative deficiency existing in the month prior to the month in which this proposal was adopted as a final rule. If the producer selected the 1977 calendar year to establish the property's BPCL, the BPCL could be adjusted in accordance with the formula of 10 CFR 212.76, based upon the property's actual decline in production experienced between 1974 and 1977.

This proposal would permit producers of lower tier crude oil to establish and thereafter adjust a BPCL that is more current than is permitted under the present provisions of the crude oil pricing regulations. We have considered a similar proposal which would have permitted an adjusted BPCL and decline rate for the property in the manner provided under Alternative Proposal No. 1 for the Marginal BPCL, rather than under § 212.76. We have decided not to adopt this variation.

We have decided instead to (1) eliminate all existing cumulative deficiencies on a one-time basis, and (2) provide producers with the option either to continue the property's existing BPCL and existing adjustments (if any), or adopt as the BPCL the property's average monthly production and sale of old crude oil during the six-month period ending

March 31, 1979, and to reduce the updated BPCL each month by a factor of 1½ percent during calendar year 1979. Effective January 1, 1980 (the mid-point of the updated BPCL period), the updated BPCL will be reduced by a factor of 3 percent each month. Where the producer elects to use as a property's BPCL the average monthly production and sale of old crude oil from the property during the six-month period ending March 31, 1979, the first BPCL adjustment will be made effective June 1, 1979, and will effect a BPCL reduction of 9 percent to reflect 1½ percent reductions for each of the months of January through May 1979. These BPCL adjustments do not apply to marginal properties.

C. Alternative Proposal No. 3: Release of Some Crude Oil Production From All Wells to Market Prices

Under this proposal, a certain volume of the daily crude oil production from each well on a property would be eligible for sale at market prices. We specifically solicited comments on the question of how many barrels of crude oil per day per well should be released under this proposal in order to provide an adequate incentive for maintaining domestic production.

We also considered releasing a certain volume of current crude oil production to market prices for those properties that have secondary or tertiary recovery projects to encourage the use of enhanced recovery methods. In that regard, commenters discussed whether it would be necessary and administratively feasible for us to require evidence that the property for which the incentive is sought is subject to a *bona fide* secondary or tertiary recovery project.

D. Alternative Proposal No. 4: Increase in Lower Tier Ceiling Price

This proposal would have increased ceiling prices of lower tier crude oil by an amount to be determined in light of data received in response to the November 2 Notice.

We have decided to continue this proceeding for the purpose of soliciting comments addressed to whether we should escalate lower tier and upper tier ceiling prices at faster than the rate of inflation as measured by the GNP deflator, or otherwise adjust lower tier and upper tier ceiling prices. Although we have not closed the rulemaking on this alternative, we have determined not to take any action on this proposal at this time.

E. Additional Proposal To Eliminate 21 Cent Per Barrel Entitlement Penalty for Uncontrolled Crude Oil

Under the entitlements program, there is currently a 21 cent per barrel fixed advantage for refiners' receipts of lower tier and upper tier domestic crude oils as compared with receipts of imported crude oil. In the November 2 Notice, we proposed that this 21 cent fixed advantage be eliminated based on our tentative conclusion that there are sufficient incentives to refine domestic crude oil, and that the 21 cent penalty may be imposing an inappropriate burden on those refiners that are dependent on imported crude oil. Commenters were divided over this proposal. Generally, refiners favored this proposal and producers opposed it. We are deferring consideration of this proposal and will continue to receive comments in this proceeding as to whether we should adopt this proposal.

IV. Discussion of Comments

We received oral or written comments from more than sixty parties including major integrated refiners, large and small independent refiners, retailers, trade associations, air carriers, and governmental representatives.

Most of the comments strongly agreed that additional incentives are appropriate at this time in order to optimize the production of domestic crude oil, especially with respect to crude oil that is produced from the nation's older, declining properties, but urged that the elimination of all first sale price controls over domestic crude oil would be a better way to optimize domestic production. The following summary addresses the significant aspects of the written and oral comments with respect to each of the major proposals.

A. Alternative Proposal No. 1

Our proposal to create specific price incentives for crude oil produced and sold from marginal properties received general acceptance from commenters and was generally favored over other proposals. It was thought to be a positive step to correct what has been regarded as inadequate incentives to encourage the maintenance or development of marginal properties under our current regulations. Commenters generally agreed that production costs for domestic crude oil significantly increase in proportion to the depth of that production, and that in defining a marginal property we should use qualifying thresholds which relate average daily production levels to average completion depths. (Our proposal was based in part on the presumption that operating cost differentials as a result of high water cut were built into the "economic limit" data on depth brackets.)

The comments addressed to this proposal, however, suggested that we should consider simplifying the concept by adopting more workable regulations that would facilitate both industry compliance and DOE enforcement and provide greater incentives than those offered in the proposal. The most frequent suggestion was to eliminate the "marginal" BPCL entirely (or to establish it at zero) for all marginal properties. In effect, marginal properties would be analogous to stripper well properties and once a property qualified as marginal, all crude oil produced and sold from the property would qualify in first sales for market prices. The major advantage of such a rule would, of course, be simplicity. No "market tier" would be created, and no declining marginal BPCL computations would be required.

B. Alternative Proposal No. 2

Most commenters perceived our proposal to eliminate existing cumulative deficiencies and to update BPCL's generally as a possible vehicle for the ultimate decontrol of first sales of all domestic crude oil. Comments generally suggested that the elimination of current cumulative deficiencies and updating of BPCL's would provide little incentive for increased production if implemented on a one-time-only basis. However, when implemented in conjunction with a declining BPCL, an updated BPCL based on crude oil produced and sold from properties in 1978 rather than in 1977 was viewed as a positive step. Further, comments suggested that monthly downward adjustments of the BPCL would provide the greatest opportunity at the present time for an overall increase in domestic crude oil production levels.

C. Alternative Proposal No. 3

The majority of comments stressed that a one-time release to market prices of a certain amount of current production would do little to provide incentives for increasing domestic crude oil production levels. Our proposal was to release to market prices the same volume of current production — 10 barrels per well per day — for each property. The major objection that we received was that such a mechanism would not focus the incentive on marginal properties. Moreover, 10 barrels per well per day was believed to be too little to do much in the way of increasing domestic production.

D. Alternative Proposal No. 4

While the comments generally favored increasing ceiling prices of lower tier crude oil by some fixed increment, they did not indicate that our adoption of this proposal would result in a significant increase in overall domestic production. In fact, comments suggested that an increase of two to four dollars per barrel would be necessary to substantially increase production. The real effect of this proposal, it was suggested, would be to narrow the differential between ceiling prices for lower tier and upper tier crude oil, thus easing the way for all domestic crude oil to be released to market prices.

The comments further noted that the GNP deflator was not an appropriate index by which to measure adjustments to lower tier ceiling prices. Although estimates varied, the cost of materials and operations was generally estimated to be increasing at a yearly rate of almost twice the GNP deflator.

Finally, the comments emphasized that in order to be effective as an incentive for increased domestic crude oil production any increase in lower tier ceiling prices for crude oil should be implemented generally for all properties. They argued that the time and expense of case-by-case determination by the DOE Office of Hearings and Appeals would discourage producers from applying for price relief.

E. Additional Proposal to Eliminate 21 Cent Per Barrel Entitlement Penalty for Uncontrolled Crude Oil

We received over 30 comments on our proposal to eliminate the 21 cent per barrel entitlement penalty for imported crude oil. Generally, refiners favored the proposal while producers opposed it.

Comments in favor of eliminating the penalty expressed the view that the penalty was unnecessary to create an incentive for refiners to purchase and refine domestic crude oil. Many refiners argued, however, that domestic crude oil does not need the 21 cent advantage because of its lower price and more dependable supply. Small and independent refiners which lacked adequate domestic supplies argued that they are especially disadvantaged by the 21 cent penalty. Producers and some refiners with significant domestic production were opposed to eliminating the 21 cent penalty, believing that its elimination would raise the entitlement cost for lower tier and upper tier crude oil and, hence, blunt the impact of any incentives that we might adopt for marginal properties.

F. Request for Additional Comments

In addition to comments on the specific proposals, we requested comments on any additional mechanisms that might be used to optimize domestic crude oil production in general and production from marginal properties in particular. Of the 40 comments that offered alternatives to our specific proposals, almost all urged total decontrol of domestic crude oil as the best incentive to increase production.

Many of the comments expressly suggested that we decontrol all domestic crude oil by October 1, 1981. Under the scenario most frequently outlined in these comments, both lower tier and upper tier ceiling prices would be increased by June 1, 1979. to the maximum levels currently permitted under the first sale composite price restrictions of Section 8 of the EPAA. On June 1, 1979, all upper tier crude oil would be permitted to receive market prices and, through a system of phased decontrol by which monthly volumes would be released to market prices, all lower tier crude oil would be exempt from control by October 1, 1981.

V. AMENDMENTS ADOPTED

A. Upper Tier Ceiling Prices for Crude Oil Produced and Sold From "Marginal" Properties

Comments submitted in response to our request in the November 2 Notice confirm our earlier tentative conclusion that production costs for domestic crude oil increase significantly in proportion to the depth of that production. For example, our data indicate that direct operating costs at a depth of 8,000 feet average approximately 41 percent above those experienced by domestic producers at a depth of 4,000 feet. Moreover, we believe that based on the comments we received, we can provide an incentive to domestic producers that is more adequately tailored to the various production situations by permitting properties to qualify as "marginal" based upon varying production levels at different depths, and to allow a large percentage of the crude oil produced and sold from such properties to be sold at upper tier ceiling prices on June 1 of this year and the remainder at the start of next year. In this way we believe that we can improve our regulations to provide better incentives for maintaining and increasing overall domestic production from this category of properties, such incentives being more nearly commensurate with the differing levels of operating costs likely to be experienced with respect to individual properties.

To illustrate: the stripper well property exemption provides market prices in first sales of crude oil from any property where production of crude oil, excluding condensate recovered in non-associated production, has averaged 10 barrels or less per well per day during any preceding 12-month period beginning after December 31, 1972. This congressionally mandated exemption is designed, through the incentive of exempt prices based on the statutory presumption of threshold economic marginality at 10 barrels of crude oil per well per day for a consecutive 12-month period, to promote the continued operation of economically marginal properties, the production from which might otherwise be lost.

We are aware, however, that some incentive is also appropriate for other properties that do not fall within the definition of a stripper well property, but which are nevertheless economically marginal, or are approaching that limit because of higher operating costs. The marginal property amendment which we are adopting in this proceeding is addressed to those properties. Moreover, we are aware that with respect to properties that are approaching the 10 barrel per well per day limit some producers have foregone, and would continue to forego, efforts to maintain or to increase production from those properties because such efforts are more economically withheld and subsequently undertaken once the property has qualified as a stripper well property. We believe that this amendment will also avoid this unintended consequence of the stripper well property exemption and should result in a significant increase in domestic crude oil production.

Accordingly, we are adopting the following amendments to the crude oil price regulations, applicable to marginal properties effective June 1, 1979.

1. Qualifications as a "Marginal Property"

Inasmuch as our concept of a marginal property is analogous to a stripper well property, and because the calculations to be used in determining a property's qualification as a marginal property are similar to those used in determining a property's qualification under the stripper well property exemption, *Rulings 1974-28, 1974-29, 1974-30, 1975-12, 1975-15, 1977-6*, and relevant portions of *Rulings 1977-1* and *1977-2* will apply with respect to marginal properties as well as to stripper well properties.

a. *Qualifying Period.* — In the November 2 Notice, we proposed a qualifying period beginning on July 1, 1977, and ending on June 30, 1978. Comments addressed to this qualifying period were favorable. A later qualifying period was viewed as being more acceptable, however, and we have decided to adopt a later period (calendar year 1978) which is more consistent with the period selected for updating BPCL's generally. Once a property has qualified as marginal, it will retain that status for the duration of price controls — even if production levels subsequently increase above the qualifying limits — in order to provide the additional incentive to increase production levels. We proposed to use a historical qualifying period — rather than the statutory "rolling" qualifying period as is used for the stripper well property exemption — so as to eliminate any incentive to curtail production in order to qualify a particular property as marginal. Comments addressed to this issue confirmed our belief that in most cases one year appears to be the optimum period to establish marginal status while providing the incentive of higher prices. A one-year period is generally long enough to compensate for short-term production anomalies and establish representative production levels, and it is not an inordinately long period of time for a property to be operated near its economic limit.

b. *Determination of "Average Completion Depth."* — In order to determine whether a particular property qualifies as a marginal property, the producer must first calculate the property's "average completion depth" of all wells that produced crude oil on the property during the qualifying period. This calculation involves dividing the sum of the completion depths for all such wells by the number of those wells. Injection wells and other wells that did not produce crude oil during the qualifying period may not be counted for purposes of these calculations.

"Completion depth" is defined as the depth from which crude oil was produced, as reported to the applicable state regulatory authority. For properties located in states where no such reports are required to be made, or where no such regulatory body exists, the producer may use the depth to the base of perforations from which the well produced crude oil. For open hole completions, the producer may use the lesser of the plugged-back depth or the base of the producing reservoir. In either case, the producer must be able to document such depths with affidavits executed by a registered petroleum engineer.

Where a well produced crude oil during the qualifying period from two or more completion depths at the same time, the well may be counted as two or more wells — and the various completion depths averaged — only where the well would qualify as a multiple completion well for purposes of the stripper well property exemption, as interpreted in *Ruling 1975-12, i.e.,* where

(a) The well consists of two (or more) separate tubing strings run inside the casing, each of which carries crude oil from a separate and distinct producing formation, *and*

(b) the production capabilities of each formation are unaffected by any change in the production level of any other formation producing through the same well.

In all other cases, for example, where a single well produces crude oil from two or more different completion depths but does not otherwise meet the criteria in *Ruling 1975-12,* the producer must count the well as one well and may use the deepest completion depth. Where a well produced crude oil during the qualifying period from two or more separate and distinct producing reservoirs, and the producer had properly elected to treat the separate reservoirs as separate properties during the qualifying period, one or more of the separate and distinct reservoirs might qualify as marginal properties depending upon average daily production during the qualifying period. In cases such as this, *i.e.,* where there was discontinuity of property treatment during the qualifying period, the producer may determine marginal property treatment on a reservoir-by-reservoir basis, provided that he is able to provide evidence of actual production volumes from each reservoir during the entire qualifying period. Otherwise, marginal property status must be determined on the basis of the property as it existed at the beginning of the qualifying period.

c. *Determination of "Average Daily Production."* — A property's average daily production during the qualifying period must be determined in the same way as is done for stripper well properties, and the provisions of the relevant stripper well property rulings will be applicable with respect to such computations. Accordingly, in calculating a property's average daily production, for example, a producer may not count injection wells, or other wells that did not produce crude oil during the qualifying period. Moreover, adjustments to average daily production must be made to account for any well which was not operated at the maximum feasible rate of production in accordance with recognized conservation practices, or was significantly curtailed by reason of mechanical failure or other disruption in production.

d. *Qualifying Thresholds.* — Once the property's average completion depth and average daily production have been determined, the producer will compare those figures with the qualifying limits set forth below.

Average Completion Depth in Feet	Average daily production
2,000 or more but less than 4,000	20 barrels or less.
4,000 or more but less than 6,000	25 barrels or less.
6,000 or more but less than 8,000	30 barrels or less.
8,000 or more	35 barrels or less.

Accordingly, the property as described in the example would qualify as a marginal property because, with an average completion depth of 4,775 feet (more than 4,000 but less than 6,000 feet), it produced less than 25 barrels of crude oil per well per day during the qualifying period. Therefore, as of June 1979, the effective date of this rule, the producer may certify the property as a marginal property.

e. *Recordkeeping.* — Once a property qualifies as a marginal property, a producer will be required, with respect to the property during the qualifying period, to maintain at its principal place of business, and make available to the DOE upon request, (1) records specifying the number of wells on a property, (2) adequate records, or a certification by a registered petroleum engineer, providing the completion depth of each well, (3) records providing the volumes of crude oil produced at each depth, and (4) records of production, including records of each time production with significantly curtailed by reason of mechanical failure or other disruption in production.

For example, assume that a property consisted of four producing wells completed at depths of 3,300 feet, 4,700 feet, 4,500 feet, and 6,600 feet, and that during the qualifying period all four wells were operated at the maximum feasible rate of production in accordance with recognized conservation practices, with no production disruptions or other curtailments. Assume also that during this period 29,500 barrels of crude oil, excluding condensate recovered in non-associated production, were produced from the property. The property's average completion depth would be computed as follows:

$$\begin{aligned} \text{ACD} &= \frac{3{,}300 + 4{,}700 + 4{,}500 + 6{,}600}{4} \\ &= 4{,}775 \text{ feet} \end{aligned}$$

The property's average daily production would be computed as follows:

$$\begin{aligned} \text{ADP} &= \frac{29{,}500 \text{ barrels}}{(365 \text{ days})\ (4 \text{ wells})} \\ &= 20.21 \text{ barrels per well per day} \end{aligned}$$

Where records of actual measured production volumes are unavailable, we will permit estimates verified by a registered petroleum engineer to be maintained.

B. *Updating of BPCL and Elimination of Existing Current Cumulative Deficiencies for All Properties.*

Effective February 1, 1976, in connection with the amendments adopted to implement the crude oil pricing policy of the Energy Policy and Conservation Act (41 FR 4931, February 3, 1976), the FEA revised the definition of base production control level (BPCL) to provide producers with the option to continue to use the then-existing BPCL or the average monthly production and sale of old crude oil during calendar year 1975 for the property. At that time the FEA found that:

> The production incentives afforded by the prior regulations [adopted initially by the Cost of Living Council in August 1973], which permitted new and released crude oil to be sold without respect to the ceiling price rule, were of decreasing impact or effectiveness because, due to natural rates of decline, production levels [were by February 1976] generally well below 1972 levels for most properties, and [were continuing] to decline. (41 FR at 4932.)

Because many properties with declining production levels were therefore unaffected by the incentives previously afforded under the price regulations, the FEA found it necessary to offer the option of using a more recent BPCL as a production incentive. In order to maximize the effectiveness of this new production incentive, the FEA eliminated all existing current deficiencies that had accumulated for properties under existing regulations.

In April 1976 the FEA amended the price regulations in order to provide an additional production incentive, with respect to those properties for which production levels were nevertheless still below the BPCL and for which production levels continued to decline so as to make the incentive of upper tier ceiling prices unrealistic. That amendment provided for BPCL adjustments based upon the annual rate of decline for the particular property concerned during the period January 1, 1972, through December 31, 1975.

Accordingly, under current regulations producers began to adjust BPCL's downward for certain properties. This adjustment has been made every six months (in January and July of each year) subject to the following qualifications. For properties from which no new crude oil was produced and sold from February 1, 1976, through June 30, 1976, the BPCL adjustments began July 1, 1976, and were permitted to be made each six months thereafter. For properties from which new crude oil was produced and sold during that five-month period, the BPCL adjustments began with the first month immediately following any six-month semi-annual period ending after June 30, 1976, during which the total production and sale of crude oil from the property was less than the sum of the property's BPCL's for that six-month period.

Once a property has qualified for the adjustment provisions contained in 10 CFR 212.76, the property's BPCL is adjusted generally as follows: During the first six-month period of adjustments, the BPCL is reduced by 75 percent of the property's annual rate of decline during the January 1972 through December 1975 period; during subsequent six-month periods, the BPCL is reduced by 50 percent of that annual rate of decline.

We have determined that the effectiveness of the production incentives offered in February and April of 1976 have significantly decreased to the point that the current price regulations no longer afford many domestic producers a realistic promise of upper tier prices with respect to most lower tier production. More than three years have elapsed since BPCL's were updated for all properties and existing current cumulative deficiencies were eliminated. By the effective date of this amendment three years will have passed since the FEA's adoption of the BPCL-adjusting regulations. Many lower tier properties are now operating at levels that are considerably below BPCL and, because of decline rates in excess of 1972 through 1975 levels, are afforded no incentive under the BPCL adjustments. Other producers have managed to increase production levels but are faced with large cumulative deficiencies that must be overcome before any crude oil may be sold at upper tier prices.

Accordingly, we have decided to eliminate all existing current cumulative deficiencies, to provide an optional updated BPCL for all properties, and to revise 10 CFR 212.76 to provide a simpler mechanism for adjusting the updated BPCL's if selected. The purpose of this amendment is to provide incentives to maintain or increase crude oil production by allowing producers to receive upper tier prices for production in excess of the property's more recent decline rate, without requiring the producer to "pay back" from such increased production the amount by which prior production had been less than the property's prior BPCL. The one-time elimination of the current cumulative deficiency should ensure that there are no disincentives to increased production solely by reason of the fact that such increased production would otherwise be required to be sold at lower tier prices.

Under the amendments, which will become effective June 1, 1979, the BPCL for any property will be equal to the average monthly production and sale of old crude oil from the property concerned during the six-month period ending March 31, 1979. For most properties from which only lower tier crude oil is currently being produced and sold, this action should provide a greater production incentive.

Significantly affected properties will fall generally into two categories: (1) those for which production levels have fallen below BPCL, either with or without cumulative deficiencies, resulting in all current production begin classified as lower tier crude oil under existing regulations; and (2) those for which production levels are above BPCL but for which cumulative deficiencies exist. Properties in the former category will benefit from a more current lower BPCL and elimination of cumulative deficiencies; those in the second category will benefit from elimination of existing cumulative deficiencies, but would not necessarily benefit from a more recent BPCL because the new BPCL might be greater than the existing BPCL. In order to assure maximum incentives, producers will be given a one-time election to use either the existing BPCL for the property or the updated BPCL.

We have decided upon the six-month period ending March 31, 1979, rather than the calendar year that was proposed, in order to provide a more current reference point for BPCL calculations. This should more accurately take into account the production declines experienced by most domestic properties during a very recent period, and still provide a sufficiently long period of time over which to measure the BPCL so as to average out any production anomalies experienced during that period.

A producer of a unitized property will also be given the option of selecting a unit BPCL based on production and sale from the unitized property during the six-month period ending March 31, 1979. However, the producer's selection of an updated unit BPCL does not constitute "the establishment of a unit BPCL" for any other purpose under the DOE regulations. For example, an updated unit BPCL may allow certain lower tier crude oil to be released to upper tier ceiling prices, but will not affect previously determined volumes of imputed stripper well crude oil, or imputed new crude oil.

Elections must be made not later than August 1, 1979, by the producer for each property by written certification pursuant to the provisions of § 212.131. Regardless of which BPCL is elected, any existing cumulative deficiency will be eliminated effective June 1, 1979.

The provisions of the cumulative deficiency rule will be modified and retained, however, so that once new crude oil is produced and sold from a property after June 1, 1979, and production and sale volumes subsequently fall below

BPCL in any month, a deficiency will begin to accrue and must thereafter be overcome before any additional volumes of new crude oil may be sold. This will serve to ensure the fulfillment of the dual policy objectives that have always been contained in the rule: (1) To provide an additional incentive to continued increased production, and (2) to act as a safeguard against possible abuses of the upper tier crude oil price incentive by periodically withholding volumes of current production for sale in later months as new crude oil. *See D.C. Latimer,* Interpretation 1976-16, 42 FR 7937 (February 8, 1977).

Several commenters pointed out, however, that the current cumulative deficiency rule may actually serve to discourage production increases by acting as an impediment to upper tier prices where the provisions of the rule are triggered by anomalous events over which the producer has no control. Such a case might arise, for example, where a sudden surge in production from a single well results in the property exceeding the BPCL by a small amount before such time as production levels are increased from the property as a whole, or where the purchaser makes an extra purchase of crude oil from the property during one month. In such cases, the producer would begin to accumulate a deficiency during a time in which efforts might otherwise be made to increase production levels generally; and when increased production levels were ultimately achieved, the cumulative deficiency would have to be "paid back" before upper tier prices could be realized.

We believe that this aspect of the rule may actually discourage the achievement of the general policies sought to be served under our regulations, and even the dual policy objectives of the rule itself. Accordingly, we are amending the rule in a way that we believe will avoid these unintended results and give the producer an opportunity to avoid the operation of the rule in most cases of production anomalies.

The amended rule will provide that a deficiency is not triggered unless the sum of the volumes of crude oil produced and sold in any consecutive two-month period exceeds the sum of the BPCL's for those two months, provided however that crude oil produced and sold in excess of the BPCL in either of those two months is not sold as new crude oil. For example, assume that the BPCL for a property is 500 barrels in July and August, and that in July 525 barrels of crude oil are produced and sold from the property. If the producer certifies 25 barrels as new crude oil, the provisions of the cumulative deficiency rule would be triggered, and for any subsequent month in which production and sale was less than the BPCL, a deficiency would accrue. However, the producer could avoid the operation of the rule by certifying the entire 525 barrels produced and sold in July as old crude oil provided the total production and sale of crude oil during the months of July and August did not exceed 1,000 barrels.

A generally-applicable BPCL reduction factor will provide a more realistic incentive for producers to maintain increased production levels from domestic properties. With respect to properties for which the producer elects to continue using the existing BPCL, that BPCL may be adjusted only in accordance with the current provisions of § 212.76. With respect to properties for which the producer elects to use as the BPCL the average monthly production and sale of crude oil during the six-month period ending March 31, 1979, the property's BPCL may be reduced by a factor of 1½ percent per month during calendar year 1979, with the first adjustment (effective June 1, 1979) calculated as if the adjustments had begun effective January 1, 1979. Accordingly, for such properties, the BPCL will be reduced effective June 1, 1979, by 9 percent, reflecting a 1½ percent reduction for each of the months from January 1979 through June 1979. Effective January 1, 1980, the factor by which a property's BPCL may be reduced is increased from 1½ percent to 3 percent per month.

We have concluded that reducing the BPCL by a lower amount in 1979 and a greater amount thereafter is advisable in order to reduce the initial inflationary impact of this proposal and also to reflect the time lag between the effective date of the amendment and the resulting additional production.

However, with respect to properties for which the producer would not exercise the option effective June 1, 1979, because of more favorable treatment under the existing provisions of § 212.76, we have concluded that the producer should not be foreclosed from using the 3 percent reduction factor effective January 1, 1980. Accordingly, for such properties, the producer may elect to use the 3 percent BPCL adjustment factor effective January 1, 1980, regardless of whether the updated BPCL and 1½ percent adjustment factor was elected effective June 1, 1979.

C. Increase in Lower Tier Ceiling Price

On March 1, 1979, we issued Crude Oil Price Schedule No. 14 permitting increases in lower tier and upper tier ceiling prices to reflect a rate of inflation of 8.1 percent as measured by the GNP deflator published in February 1979. Pursuant to schedule No. 14, lower tier prices for the months of March, April, and May 1979 are projected to average $5.78, $5.82, and $5.86 per barrel nationally, respectively.

Crude Oil Price Schedule No. 14 represents the final in a series of price increases permitted by the FEA and the DOE to implement part of the crude oil pricing policy as proposed in the National Energy Plan (NEP) issued by the President on April 20, 1977. That policy, which was subsequently reiterated by the FEA and the DOE on several other occasions, was to permit lower tier and upper tier prices to increase at no more than the rate of inflation through May 1979, at which time the President's mandatory authority under the EPAA to control first sale prices of domestic crude oil prices becomes discretionary.

We have not decided at this time to depart from the policy to permit lower tier and upper tier prices to increase at the rate of inflation, as measured by the GNP deflator.

VI. OTHER MATTERS

In adopting this rule, we have considered, in accordance with DOE Order 2030, the economic impact of our action and have prepared a regulatory analysis. Copies of the regulatory analysis, as well as the EIS, may be obtained from the ERA, Office of Public Information, 2000 M Street, NW., Room B-110, Washington, D.C. 20461, (202) 634-2170.

In accordance with Section 404 of the DOE Act, the Federal Energy Regulatory Commission received a copy of the proposed rulemaking and has notified the ERA that it has not determined that the proposed regulations would significantly affect any function within its jurisdiction under Sections 406(a)(1), (b) and (c)(1) of the DOE Act. (Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267.)

In consideration of the foregoing, Part 212 of Chapter II of Title 10 of the Code of Federal Regulations is amended as set forth below, effective June 1, 1979.

Issued in Washington, D.C., April 5, 1979.

David J. Bardin,
Administrator, Economic Regulatory Administration

1. Section 212.72 is amended to add the definitions of "Average completion depth," "Average daily production," and "Completion depth," and to revise the definitions of "Base production control level," "Current cumulative deficiency," and "New crude oil," to read as follows:

§ 212.72 Definitions.

"Average completion depth" means for each particular marginal property the sum of all completion depths for all wells that produced crude oil from the property concerned during calendar year 1978, divided by the number of such wells during that 12-month period.

"Average daily production" means for each particular marginal property the qualified maximum total production of crude oil (excluding condensate recovered in non-associated production) produced from a property, divided by 365 times the number of wells that produced crude oil (excluding condensate recovered in non-associated production) from that property during calendar year 1978. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production throughout that 12-month period and in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

"Base production control level" means: (a) with respect to months ending prior to February 1, 1976:

(1) If crude oil was produced and sold from the property concerned in every month of 1972, the total number of barrels of domestic crude oil produced and sold from that property in the same month of 1972;

(2) If crude oil was not produced and sold from the property concerned in every month of 1972, the total number of barrels of crude oil produced and sold from that property in 1972, divided by 12;

(b) With respect to months commencing after January 31, 1976, except as provided in § 212.76(a), either:

(1) The total number of barrels of old crude oil produced and sold from the property concerned during calendar year 1975, divided by 365, multiplied by the number of days during the month in 1975 which corresponds to the month concerned; or

(2) If the producer elects to certify crude oil sales for 1972 in accordance with § 212.131(a)(2), the total number of barrels of crude oil produced and sold from the property concerned during calendar year 1972, divided by 366, multiplied by the number of days during the month in 1972 which corresponds to the month concerned;

(c) With respect to months commencing after May 31, 1979, except as provided in § 212.76, for properties other than marginal properties, either:

(1) The total number of barrels of old crude oil produced and sold from the property concerned during the six-month period ending March 31, 1979, divided by 182, multiplied by the number of days during the month in 1978 which corresponds to the month concerned; or

(2) If the producer elects to certify crude oil sales for 1975 in accordance with § 212.131(a)(2), the total number of barrels of old crude oil produced and sold from the property concerned during calendar year 1975, divided by 365, multiplied by the number of days during the month in 1975 which corresponds to the month concerned; or

(3) If the producer elects to certify crude oil sales for 1972 in accordance with § 212.131(a)(2), the total number of barrels of crude oil produced and sold from the property concerned during calendar year 1972, divided by 366, multiplied by the number of days during the month in 1972 which corresponds to the month concerned;

(d) With respect to marginal properties, the base production control level equals (1) with respect to months commencing after May 31, 1979, 20 percent of the total number of barrels of old crude oil produced and sold from the property concerned during calendar year 1978, divided by 365, multiplied by the number of days during the month in 1978 which corresponds to the month concerned; (2) for the months commencing after December 31, 1979, zero.

"Completion depth" means the depth from which crude oil was produced, as reported to the applicable state regulatory authority. Where such reports are not required to be made, completion depth means the depth in feet measured from ground level, or from the top of the surface casing, along the bore hole to the base of perforations from which a well produces crude oil; with respect to a well which has been completed "open hole," completion depth means the lesser of (a) the depth to the base of the reservoir, or (b) the "plugged-back" depth. Provided that where no official state regulatory depth report has been made, completion depth must be documented with an affidavit executed by a registered petroleum engineer.

"Current cumulative deficiency" means: (a) For months prior to February 1, 1976, the total number of barrels by which production and sale of crude oil was less than the base production control level, for all months in which production and sale of crude oil was less than the base production control level subsequent to the first month in which new crude oil was produced and sold, minus the total number of barrels of domestic crude oil produced and sold in each prior month which was in excess of the base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current cumulative deficiency;

(b) For months commencing after January 31, 1976, the total number of barrels by which production and sale of crude oil has been less than the base production control level subsequent to the first month (after February 1, 1976) in which new crude oil was produced and sold, minus the total number of barrels of domestic crude oil produced and sold in each month after February 1, 1976, which was in excess of the base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current cumulative deficiency;

(c) For months commencing after May 31, 1979, at the option of the producer either (1) the total number of barrels by which production and sale of crude oil has been less than the base production control level subsequent to the first month (after June 1, 1979) in which new crude oil was produced and sold, minus the total number of barrels of domestic crude oil produced and sold in each prior month after June 1, 1979, which was in excess of the base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current cumulative deficiency; or

(2) The total number of barrels by which production and sale of crude oil has been less than the base production control level subsequent to any two-month period in which the total production and sale of crude oil from the property concerned exceeds the sum of the property's base production control levels for that two-month period, minus the total number of barrels of domestic crude oil produced and sold in each prior month after June 1, 1979, which was in excess of the base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current cumulative deficiency. A producer may not elect this option (2) for any property from which new crude oil was produced and sold as new crude oil in any month which begins after May 31, 1979.

* * * * * *

"Marginal property" means a property whose average daily production of crude oil (excluding condensate recovered in non-associated production) per well during calendar year 1978 did not exceed the number of barrels shown in the following table for the corresponding average completion depth:

Table

Average completion depth in feet	Barrels per day
2,000 or more but less than 4,000	20 or less.
4,000 or more but less than 6,000	25 or less.
6,000 or more but less than 8,000	30 or less.
8,000 or more	35 or less.

* * * * * *

"New crude oil" means, with respect to a specific property: (a) For months prior to February 1, 1976, the total number of barrels of domestic crude oil produced and sold in a specific month, less (1) the base production control level for that month, and less (2) the current cumulative deficiency;

(b) For months commencing after January 31, 1976, the total number of barrels of domestic crude oil produced and sold in a specific month, less (1) the property's base production control level for that month and less (2) the current cumulative deficiency since February 1, 1976:

(c) For months commencing after May 31, 1979, the total number of barrels of domestic crude oil produced and sold in a specific month, less (1) the base production control level for that month, and less (2) the current cumulative deficiency since June 1, 1979; and

(d) Shall not in any period include any number of barrels not certified as new crude oil pursuant to the provisions of § 212.131(a)(1) within the consecutive two-month period immediately succeeding the month in which the crude oil is produced and sold, except where such recertification is explicitly required or permitted by DOE order, interpretation or ruling.

2. Section 212.75 is amended in paragraph (b) and (g), and to add a new paragraph (h), to read as follows:

§ 212.75 Crude oil produced and sold from unitized properties.

* * * * * *

(b) *Definitions.* For purposes of this section — "Current unit cumulative deficiency" means (a) For months prior to June 1, 1979, the total number of barrels by which production and sale of crude oil from the unitized property was less than the unit base production control level subsequent to the first month (following the establishment of a unit base production control level for that unitized property) in which any crude oil produced and sold from that unit was eligible to be classified as actual new crude oil (without regard to whether the amount of actual new crude oil was exceeded by the amount of imputed new crude oil), minus the total number of barrels of domestic crude oil produced and sold in each prior month from that unitized property (following the establishment of a unit base production control level for that unitized property) which was in excess of the unit base production control level for that month, but which was not eligible to be classified as actual new crude oil because of this requirement to reduce the amount of actual new crude oil in each month by the amount of the current unit cumulative deficiency;

(b) For months commencing after May 31, 1979, at the option of the producer either (1) the total number of barrels by which production and sale of crude oil from the unitized property has been less than the unit base production control level subsequent to the first month (after June 1, 1979) in which new crude oil was produced and sold, minus the total number of barrels of domestic crude oil produced and sold from the unitized property in each prior month after June 1, 1979, which was in excess of the unit base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current unit cumulative deficiency; or

(2) The total number of barrels by which production and sale of crude oil from the unitized property has been less than the unit base production control level subsequent to any two-month period in which the total production and sale of crude oil from the unitized property concerned exceeds the sum of the property's unit base production con-

trol levels for that two-month period, minus the total number of barrels of domestic crude oil produced and sold in each prior month after June 1, 1979, which was in excess of the unit base production control level for that month, but which was not classified as new crude oil because of this requirement to reduce the amount of new crude oil in each month by the amount of the current unit cumulative deficiency. A producer may not elect this option (2) for any unitized property from which new crude oil was produced and sold as new crude oil in any month which begins after May 31, 1979.

* * * * * *

(g) Notwithstanding the provisions of the definition of "Unit base production control level" in paragraph (b) of this section, with respect to any unitized property for which a unit base production control level was established prior to June 1, 1979, a producer may, effective June 1, 1979, select as the unit base production control level, the total number of barrels of old crude oil produced and sold during the six-month period ending March 31, 1979, from all properties that constitute the unitized property, divided by 182, times the number of days during the month in 1978 which corresponds to the month concerned. The selection of a unit base production control level pursuant to this paragraph (g) does not constitute the "establishment" of a unit base production control level" for any purpose under this Part.

(h) The provisions of this section shall apply to each first sale of crude oil from a unitized property.

3. Section 212.76(a) is revised to read as follows:

§ 212.76 Adjustments to base production control levels.

(a) *Eligibility.* — (1) With respect to each property for which a base production control level is not determined pursuant to the provisions of paragraph (c)(1) of the definition of "base production control level" in § 212.72, and from which no new crude oil is produced in any month in the five-month period ending June 30, 1976, after June 30, 1976, a producer may adjust the base production control level for the property concerned for each month during that six-month period in accordance with paragraph (b) of this section.

(2) With respect to each property for which a base production control level is not determined pursuant to the provisions of paragraph (c)(1) of the definition of "base production control level" in § 212.72, and from which new crude oil is produced in any month in the five-month period ending June 30, 1976, a producer may adjust the base production control levels applicable thereto in accordance with paragraph (b) of this section, commencing with the six-month semiannual period immediately following a six-month semiannual period ending subsequent to June 30, 1976, in which the total amount of crude oil produced and sold from the property concerned was less than the sum of the base production control levels for that period.

(3)(i) Effective June 1, 1979, with respect to any property for which the base production control level is determined pursuant to the provisions of paragraph (c)(1) of the definition of "base production control level" in § 212.72, and with respect to any unitized property for which the unit base production control level is selected pursuant to the provisions of paragraph (g) in § 212.75, a producer may adjust the base production control level for the property concerned in each month only in accordance with the following formula —

$$\mathrm{ABPCL} = [1 - (\mathrm{N})(.015)]\,(\mathrm{BPCL})$$

Where:

ABPCL = The adjusted base production control level or the adjusted unit base production control level for the month concerned.

BPCL = The base production control level or the unit base production control level for the month concerned.

N = The number of months, including the month concerned, since December 31, 1978.

(ii) Effective January 1, 1980, with respect to any property a producer may adjust the base production control level or unit base production control level in accordance with the following formula —

$$ABPCL = [(.82) - (N)(.03)]\ (BPCL)$$

Where:

ABPCL = The adjusted base production control level or the adjusted unit base production control level for the month concerned.

BPCL = The base production control level or the unit base production control level for the month concerned.

N = The number of months, including the month concerned, since December 31, 1979.

3. Section 212.128 is amended to add a new paragraph (c) to read as follows:

§ 212.128 Recordkeeping.

* * * * *

(c) *Marginal properties.* Each producer of crude oil from a marginal property shall, with respect to the qualifying period, maintain at its principal place of business, (1) records specifying the number of wells on the property, (2) adequate records or a certification by a registered petroleum engineer, providing the completion depths of each well, and (3) records providing the volumes of crude oil produced at each depth. Where actual volumes are unavailable, estimates verified by a registered petroleum engineer will be required to be maintained. Access to such records, with adequate opportunity for duplication by DOE, will immediately be provided to the DOE upon request of DOE audit personnel.

4. Section 212.131 is amended by revising paragraphs (a)(2)(iii) and (a)(3)(iii) to read as follows:

§ 212.131 Certification of domestic crude oil sales.

* * * * * *

(a)(2) *Non-stripper well properties.*

* * * * * *

(iii) The certification required under this paragraph (a)(2) of this section shall be made within the consecutive two-month period immediately following the month of September 1976, or, with respect to any property from which crude oil has not been produced and sold prior to September 30, 1976, the certification required under this paragraph (a)(2) of this section shall be made within the two-month period immediately following the first month in which crude oil is produced and sold. With respect to any property for which a base production control level is determined pursuant to the provisions of paragraph (3)(1) of the definition of "base production control level," the certification required under this paragraph (a)(2) of this section shall be made within the two-month period immediately following the month of June 1979.

* * * * * *

(a)(3) *Unitized properties.*

* * * * * *

(iii) The certification required under this paragraph (a)(3) of this section shall be made within the consecutive two-month period immediately following the month of September 1976, or, with respect to any unitized property for which a unit base production control level has not been established prior to September 30, 1976, the certification required under this paragraph (a)(3) of this section shall be made within the consecutive two-month period immediately following the first month in which such unit base production control level is established. With respect to any unitized property for which a unit base production control level is established pursuant to the provisions of § 212.75(g), the certification required under this paragraph (a)(3) of this section shall be made within the two-month period immediately following the month of June 1979.

(Docket No. ERA-R-78-18)
(FR Doc. 79— 13086 Filed 4-24-79; 4:16 pm)
BILLING CODE 6450-01-M

1 C.F.R. § 18.12

§ 18.12 Preamble requirements.

(a) Each agency submitting a proposed or final rule document for publication shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal.

(b) The preamble shall be in the following format and contain the following information:

AGENCY:

(Name of issuing agency)

ACTION:

(Notice of Intent). (Advance Notice of Proposed Rulemaking). (Proposed Rule). (Final Rule). (Other).

SUMMARY:

(Brief statements, in simple language, of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action.)

DATES: ....

(Comments must be received on or before: ....) (Proposed effective date: ....) (Effective date: ....) (Hearing: ....) (Other: ....)

ADDRESSES:

(Any relevant addresses.)

FOR FURTHER INFORMATION CONTACT: ....
....

(For Executive departments and agencies, the name and telephone number of a person in the agency to contact for additional information about the document [Presidential Memorandum, 41 FR 42764, September 28, 1976].)

SUPPLEMENTARY INFORMATION: ....
....
(As required by the provisions of paragraph (c) of this section.)

(c) When the issuing agency determines that the information provided under paragraph (b) of this section is inadequate as a matter of law, or is insufficient to adequately inform a reader who is not an expert in the subject area, or that a report of additional information is in the public interest, the agency shall include in the preamble the following information, as applicable:

(1) A discussion of the background and major issues involved;

(2) In the case of a final rule, any significant differences between it and the proposed rule;

(3) A response to substantive public comments received; and

(4) Any other information the agency considers appropriate.

[41 FR 56624, Dec. 29, 1976]

Title 1 — General Provisions

[41 Fed. Reg. 56623]

CHAPTER I — ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER

PART 18 — PREPARATION AND TRANSMITTAL OF DOCUMENTS GENERALLY

Clarity of Rulemaking Documents in the Federal Register

AGENCY: Administrative Committee of the FEDERAL REGISTER.

ACTION: Final rule.

SUMMARY: This rule prescribes format requirements for the preamble that accompanies the regulatory text of a proposed or final rulemaking document. These requirements are intended to improve the clarity of documents published in the FEDERAL REGISTER since the present preamble requirement has not resulted in clear, simple explanations of rulemaking documents.

Effective Date: April 1, 1977.

For Further Information Contact:

Martha Girard, Special Projects Unit, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, DC 20408. (202-523-5240).

Supplementary Information: On August 5, 1976, the Administrative Committee of the FEDERAL REGISTER published a proposed rule (41 FR 32861) to revise the present preamble requirements for certain FEDERAL REGISTER documents (1 CFR 18.12). As the Committee stated at that time, the present requirement was adopted in 1972 to introduce some uniform compliance with the public information function of the FEDERAL REGISTER and to make the information published easier to understand. The primary purpose of the proposed change was to improve the public notice giving function of the FEDERAL REGISTER.

Virtually all of the 46 comments received in response to the proposed changes were favorable. Several commenters, while agreeing in principle with the proposal, raised questions or made suggestions that convinced the Committee that a number of changes from the proposed rule are warranted.

DISCUSSION OF MAJOR COMMENTS

WHAT SHALL WE NAME IT?

The Committee received a wide variety of suggested names for what has traditionally (at least in the legal community) been called the preamble. After considering all of the comments and suggestions, the Committee has concluded there is not sufficient agreement on any one name to justify "regulating" a new name. Therefore, the Committee intends to continue to use the term preamble.

SHOULD THE RULE APPLY TO ALL FEDERAL REGISTER DOCUMENTS?

The Committee's proposed revision of § 18.12 contained mandatory requirements for the opening part of each FEDERAL REGISTER document. After considering the comments received, the Committee has concluded that these requirements should not apply to documents published in the Notices Section of the FEDERAL REGISTER at this time. This will permit agencies to concentrate their initial efforts on proposed and final rule documents which in general have more legal significance and public impact. It will also permit the Office of the Federal Register to evaluate the effectiveness of the new format requirements in actual use and to determine whether the same format should apply to notice documents.

Another commenter suggested that the § 18.12 requirements should be strictly advisory and not mandatory. The Committee does not agree. The public notice giving function of the FEDERAL REGISTER requires, at a minimum, that each rulemaking document be intelligible. For the public to use the FEDERAL REGISTER, for the staff of the Office of the Federal Register to perform its indexing function, it is essential that each rulemaking document contain an adequate preamble.

Additionally, it was suggested that the agencies be permitted some latitude as to preamble format. The Committee considers that adequate flexibility exists to accommodate agency needs under the "Supplementary Information" section. The Committee believes that it is important to provide relative consistency within the first six items of the preamble. This will aid FEDERAL REGISTER users and will also make practical the proposed Weekly Digest which is currently in the planning stage. (See GSA Consumer Representation Plan, 41 FR 42862, September 28, 1976).

HOW MUCH DETAIL IS REQUIRED?

Two comments were received concerning the need for paragraph (d), which proposed to require the issuing agency to make a determination of the need for additional information in the public interest of the type described in paragraph (c). The requirement for the agency to make a determination of a need for additional detailed information has been incorporated into paragraph (c) and paragraph (d) has been dropped. In addition, paragraph (c) has been rewritten to make it clear that it is up to the issuing agency to determine how much information must be supplied to satisfy both the legal and public information requirements of FEDERAL REGISTER publication.

The Committee does not feel that the requirement for detailed background information should be mandatory for all documents. There are a significant number of simple and routine documents which do not require detailed information to fully inform the public of the agency action. The issuing agency is best qualified to identify the audience being addressed and to assure that each document communicates its intended message to that audience.

BURDEN

Several commenters requested clarification of the term "burden." One commenter suggested that paragraphs (c)(4) and (5) be revised "to incorporate a statement of consumer burden." Another commenter suggested that paragraphs (c)(4) and (5) be reversed and placed under the requirements of paragraph (b) so as to make them mandatory. Finally, one commenter suggested that the requirements should "be specific as to costs citing a dollar amount."

The Committee has reconsidered the issue and has decided not to list "burden" as a separate requirement in paragraph (b). To some extent this is already covered by Executive Order 11821 (39 FR 41501) which requires the evaluation of inflationary impact for all rulemaking documents. Furthermore, if burden (economic or other) is a significant issue, then an agency should discuss it under the general requirements of paragraph (c).

IMPACT STATEMENTS

Two commenters requested that the appropriate impact statements be included in the introductory summary. Two commenters requested clarification of the term "appropriate impact statements." Upon further consideration, the Committee has decided to delete reference to impact statements as a separate requirement. It is anticipated that the responsible agencies will continue to include references to appropriate impact statements (environmental, economic, etc.) in documents where impact is a significant issue for public consideration.

WHY SUCH SIMPLE LANGUAGE?

One Federal agency stated:

> The proposed approach is too broad in that it reduces everything for lay public consumption. For instance, what about technical matters designed for specific group consumption only, such as capitation grants for schools of nursing?

The Committee acknowledges that many problems addressed by Federal agencies are extremely complex and technical and therefore some regulations are necessarily complex and technical.

Summary: (Brief statements, in simple language, of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action.)

Dates: (Comments must be received on or before: ....)(Proposed effective date: ....) (Effective date: ....) (Hearing: ....) Other: ....)

Addresses: ....

(Any relevant addresses.)

For further information contact: ....

(For Executive departments and agencies, the name and telephone number of a person in the agency to contact for additional information about this document [Presidential Memorandum, 41 FR 42769, September 28, 1976].)

Supplementary information: ....

(As required by the provisions of paragraph (c) of this section.)

(c) When the issuing agency determines that the information provided under paragraph (b) of this section is inadequate as a matter of law, or is insufficient to adequately inform a reader who is not an expert in the subject area, or that a report of additional information is in the public interest, the agency shall include in the preamble the following information, as applicable:

(1) A discussion of the background and major issues involved;

(2) In the case of a final rule, any significant differences between it and the proposed rule;

(3) A response to substantive public comments received; and

(4) Any other information the agency considers appropriate.

§ 18.16 [Reserved]

2. By revoking and reserving § 18.16.

(44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR 1954-1958, Comp. p. 189.)

James B. Rhoads,
Chairman.

Thomas F. McCormick,
Member.

Mary O. Eastwood,
Member.

Approved:

Edward H. Levi,
Attorney General.
Jack Eckerd,
Administrator of General Services.

[FR Doc. 76-38173 Filed 12-28-76; 8:45 am]

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subscription does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

12 U.S.C. § 1904, NOTE 201, 211

"§ 201. Short title

"This title may be cited as the 'Economic Stabilization Act of 1970'.

"§ 202. Findings

"It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest, and that in order to maintain and promote competition in the petroleum industry and assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

• • •

"§ 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2) of Title 5], and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code [section 1292(b) of Title 28]; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2) of Title 5], or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

PUBLIC LAW 93—159; 87 STAT. 627

FINDINGS AND PURPOSE

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[15 U.S.C. § 751] Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

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MANDATORY ALLOCATION

[15 U.S.C. § 753] Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f), such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil,

and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c)(1) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide —

> (A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and
>
> (B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or

(ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d), the mandatory allocation program established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) The regulation under subsection (a) shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use by ultimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b).

(e)(1) The provisions of the regulation under subsection (a) shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b)(1)(E) or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2) (A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 5(b) for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f)(1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If —

(A) an order or regulation under section 203(a)(3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment of this Act, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) to the mandatory allocation program required under this Act,

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(g)(1) The regulation promulgated and made effective under subsection (a) shall remain in effect until midnight February 28, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under Section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975.

(2) If at any time after the date of enactment of this Act the President finds that application of the regulation under subsection (a) to crude oil, residual fuel oil, or a

refined petroleum product is not necessary to carry out this Act, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this Act, he may prescribe an amendment to the regulation under subsection (a) exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more than one oil or one product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment.

ADMINISTRATION AND ENFORCEMENT

[15 U.S.C. § 754] Sec. 5. (a)(1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under this Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

(b) The President may delegate all or any portion of the authority granted to him under this Act to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

ENERGY CONSERVATION ACT

89 STAT. 874

Statement of Purposes

[42 U.S.C. § 6201.] Sec. 2. The purposes of this Act are —

(1) to grant specific standby authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data.

TITLE IV — PETROLEUM PRICING POLICY AND OTHER AMENDMENTS TO THE ALLOCATION ACT

PART A — PRICING POLICY

OIL PRICING POLICY

[15 U.S.C. § 757] Sec. 401. (a) The Emergency Petroleum Allocation Act of 1973 is amended (15 USC 751 note) by adding at the end thereof the following new sections:

89 STAT. 941

"OIL PRICING POLICY

"Sec. 8 (a) Not later than the first day of the (15 USC 757) second full calendar month following the date of enactment of this section, the President shall promulgate and make effective an amendment to the regulation under section 4(a) of this Act (15 USC 753) which regulation, as amended, shall establish ceiling prices (or the manner of determining ceiling prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month and each of the 39 months thereafter shall not exceed a maximum of $7.66 per barrel (hereinafter in this section referred to as the "maximum weighted average first sale price"), except as may be adjusted pursuant to this section.

"(b)(1) The regulation under section 4(a), as amended pursuant to subsection (a) of this section or by any subsequent amendment thereto, may, subject to the limitations related to the maximum weighted average first sale price and other requirements of this section, provide for different ceiling prices (or manner of determining ceiling prices) for different classifications of crude oil produced in the United States. In providing for different ceiling prices (or the manner for determining such ceiling prices) and classifications for such crude oil, the President shall determine that such ceiling prices (or the manner for determining such ceiling prices) and such classifications —

"(A) are administratively feasible; and

"(B) are justified on the basis that such prices and such classifications are consistent with obtaining optimum production of crude oil in the United States.

"(2) No amendment to the regulation under section 4(a) made after the date of enactment of this section may permit, in any month which begins after such date, an increase in the price for any volume of old crude oil production from any priorities[1], unless the President finds that such amendment —

"(A) will give positive incentives for (i) enhanced recovery techniques, or (ii) deep horizon development, from such properties; or

"(B) is necessary to take into account declining production from such properties; and

"(C) is likely to result in a level of production from such properties beyond that which would otherwise occur if no such amendment were made.

"(3) As used in paragraph (2), the term 'old crude oil production' ("Old crude oil production") means that volume of crude oil produced and sold from a property in a month which is equal to or less than the volume of old crude oil, as defined in section 212.72 of title 10, Code of Federal Regulations (as in effect on November 1, 1975),

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[1] So in original. Probably should be "properties".

September, October, and November of 1975, divided by 3.
produced and sold from such property in the months of

"(c)(1) Not later than 6 months after the effective date of the amendment promulgated under subsection (a), and not later than every 6 months thereafter, the President shall, on the basis of valid and reliable information (which may include information obtained by a valid and reliable sampling technique) of actual first sale prices of domestic crude oil, determine whether and the extent to which the actual weighted average first sale price for crude oil produced in the United States during any 6-month period or portion thereof for which data are available following the effective date of the amendment promulgated under subsection (a) of this section, exceeded or was less than the maximum weighted average first sale price of such crude oil specified in subsection (a) as may be adjusted pursuant to this section.

"(2) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a), as amended (15 USC 753), resulted in an actual weighted average first sale price in excess of the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he shall amend the regulation to make such compensating adjustments as are necessary to result, in a corresponding period, in an actual weighted average first sale price for domestic crude oil sufficient to offset such excess.

"(3) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a), as amended, resulted in an actual weighted average first sale price less than the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he may, notwithstanding the requirements of this section pertaining to such maximum weighted average first sale price, amend the regulation to make such compensating adjustments in the regulation as are necessary to offset the deficiency in a corresponding period.

"(d)(1) The amendment promulgated pursuant to subsection (a) of this section (or any subsequent amendment to the regulation under section 4(a)) may provide for an adjustment to the maximum weighted average first sale price specified in subsection (a), such adjustment to begin no earlier than in the calendar month following the first month the amendment is in effect —

"(A) to take into account the impact of inflation as measured by the adjusted GNP deflator; and

"(B) as a production incentive;

except that any adjustment as a production incentive shall not permit an increase in the maximum weighted average first sale price in excess of 3 per centum per annum (compounded annually), unless modified pursuant to this section, and the combined effect of any such adjustments referred to in subparagraphs (A) and (B) shall not result in an increase in the maximum weighted average first sale price in excess of 10 per centum per annum (compounded annually), unless modified pursuant to this section.

"(2) As used in this subsection, the term 'adjusted GNP deflator' ("Adjusted GNP deflator") means the first revision of the quarterly percent charge, seasonally adjusted at annual rates, of the most recent implicit price deflator for the gross national product which shall be computed and published for each calendar quarter by the Department of Commerce, subject to such additional modification as the President shall make to exclude therefrom any amount which he determines is attributable solely and directly to increases which occur after the date of enactment of this section in prices of imported crude oil, residual fuel oil, or any refined petroleum product resulting from concerted action of two or more petroleum exporting countries.

"(3) The adjustment as a production incentive referred to in paragraph (1)(B) may be made only on a finding by the President that such an adjustment is likely to provide positive incentive for —

"(A) the discovery or development of high cost and high risk properties (including new wildcat properties, and properties located on the Outer Continental Shelf, properties located north of the Arctic Circle, deep wells and deep horizons in onshore or offshore properties, and properties operated by independent producers);

"(B) the application of enhanced recovery techniques to producing properties to obtain a level of production higher than would otherwise occur from those properties but for such adjustment; or

"(C) sustaining production from marginal wells, including production from stripper wells.

"(e)(1) Not earlier than 90 days after the effective date of the amendment promulgated under subsection (a) and not earlier than 90 days after the date of any previous submission under this subsection, the President may submit to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, (*Post*, p. 965. 15 USC 753.) an amendment to the regulation promulgated under section 4(a) which provides for (A) a production incentive adjustment to the maximum weighted average first sale price in excess of the 3 per centum limitation specified in subsection (d)(1), (B) a combined adjustment limitation in excess of the 10 per centum limitation specified in such subsection, or (C) both.

"(2) Any such amendment shall be accompanied by a finding that an additional adjustment as a production incentive, or a combined adjustment limitation greater than permitted by subsection (d)(1), or both, is necessary to provide a more adequate incentive with respect to the matters referred to in subparagraphs (A), (B), or (C) of subsection (d)(3).

"(3) Any such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(f)(1) On February 15, 1977, the President shall submit to the Congress a report (Report to Congress) containing an analysis of the impact of any amendment adopted pursuant to this section on the economy and on the supply of crude oil, residual fuel oil, and refined petroleum products.

"(2) The President may submit with such report to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to the regulation promulgated under section 4(a) which —

"(A) provides for the continuation or modification of the adjustment as a production incentive (referred to in subsection (d) as may have been amended pursuant to subsection (e));

"(B) provides for a modification of the combined adjustment limitation (referred to in subsection (d), as may have been amended pursuant to subsection (e)); or

"(C) provides for adjustments with respect to both subparagraphs (A) and (B).

"(3) Such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(4) If any such amendment is disapproved by either House of Congress, the President may, not later than 30 days after the date of such disapproval, submit one additional amendment in accordance with paragraph (2), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(5) If no amendment to continue or modify the adjustment as a production incentive takes effect, no such adjustment to the maximum weighted average first sale price thereafter may be taken into account in computing such price for any month which begins after (A) the date on which a submission could have been made under paragraph (2) but was not, or (B) the last date on which a submission was disapproved and no further submission pursuant to paragraph (4) could be made, except that the President may, pursuant to the procedures under subsection (e), submit an amendment to the regulation to provide for a prospective reinstatement of such adjustment or of a modification of such adjustment.

"(g)(1) On April 15, 1977, the President shall submit to the Congress a report (Report to Congress.) as to whether the regulation promulgated under section 4(a) and in effect on such date will provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2)(A) without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States.

"(2) If the President determines that a price required to provide positive price incentives (Regulation amendment, submittal to Congress.) for the development of the domestic crude oil production referred to in paragraph

(2)(A) would, because of the maximum weighted average first sale price specified in subsection (a) of this section, as adjusted, have the effect of reducing or limiting ceiling prices permitted for crude oil produced in the remainder of the United States to levels which would result in less production of such crude oil than would otherwise occur, the President may, together with such report, or at any time thereafter not earlier than 90 days after any previous submission under this subsection, except as provided in paragraph (4), submit to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act an amendment (*Post*, p. 965.) to the regulation promulgated under section 4(a) which —

"(A) excludes up to 2 million barrels a day of crude oil production transported through the trans-Alaska pipeline from the computation of the maximum weighted average first sale price specified in subsection (a); and

"(B) establishes ceiling prices (or a manner of determining prices) for the first sale of crude oil production referred to in subparagraph (A) such that the actual weighted average first sale price for such production will not exceed the highest actual weighted average first sale price permitted under the regulation for significant volumes of any other classification of domestic crude oil.

"(3) Any such amendment shall be accompanied by such findings and supporting rationale as the President determines justify such ceiling prices (or manner for determining such prices). Any amendment submitted to the Congress pursuant to this subsection shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(4) If any such amendment is disapproved by either House of Congress, the President may not later than 30 days after the date of such disapproval submit one additional amendment in accordance with paragraphs (2) and (3), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(5) If any amendment submitted by the President to the Congress pursuant to this subsection becomes effective, such amendment may thereafter be further amended by the President, subject to the procedures and requirements of paragraphs (2) and (3) of this subsection, except that no such further amendment shall be submitted earlier than January 1, 1978, and thereafter no earlier than 90 days after the date of any previous submission made under this paragraph.

"(h)) In any judicial review of an amendment required by this section to be submitted to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, (*Post,* p. 965.) the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of this section or of subparagraph (A), (E), or (F) of section 706(2) of title 5, United States Code.

"PASSTHROUGHS OF PRICE DECREASES

"Sec. 9. Not later than the first day (15 USC 758.) of the second full calendar month following the date of enactment of this section, the regulation under section 4(a) shall provide for a dollar-for-dollar passthrough in prices at all levels of distribution from the producer through the retail level of decreases in the costs of crude oil, residual fuel oil, and refined petroleum products (including decreases in costs which result from a reduction in the price of crude oil produced in the United States because of the amendment to such regulation required under section 8(a)).". (*Ante,* p. 942.)

(b)(1) Subsections (d), (e) and (g) of section 4 (Repeal.) of the Emergency Petroleum Allocation Act of 1973 are repealed, and subsection (f) (15 USC 753.) of such section 4 is redesignated as subsection "(d)" of such section 4.

(2) Section 4(a) of such Act is amended by (A) striking out "Subject to subsection (f)" and inserting in lieu thereof "Subject to subsection (d)"; and (B) striking out "Except as provided in subsection (e) such" and inserting in lieu thereof "Such".

(3) Section 4(c) of such Act is amended in paragraphs (1), (4), and (5) thereof by striking out "subsections (b) and (d)" wherever it appears and by inserting in lieu thereof in each case "subsection (b)".

(4) Section 406 of Public Law 93-153 is repealed. (Repeal.)

(5) The amendments made by paragraphs (1), (2), (3), and (4) (12 USC 1904 note.) of this subsection, to the Emergency Petroleum Allocation Act of 1973 (Effective date.) (15 USC 753 note.) shall take effect on the effective date of the amendment to the regulation under Section 4(a), required by section 8(a) of such Act.

LIMITATIONS ON PRICING POLICY

SEC. 402. (a) Paragraph (2) of section 4(b) (15 USC 753.) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

"(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) —

"(A) shall provide for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level;

"(B)(i) shall not permit any net crude oil cost increases —

"(I) which are incurred by a refiner during the calendar month immediately preceding the effective date of this paragraph, or in any month thereafter, and

"(II) which are not passed through in prices charged pursuant to such regulation in the 2 calendar months following the calendar month in which such crude oil cost increases were incurred,

to be passed through by such refiner in any month subsequent to the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless the President makes the findings specified in clause (ii)(II)(aa), and such passthrough is consistent with the requirements specified in clause (ii) (II) (bb).

"(ii) shall not permit the passthrough in any month of —

"(I) any net crude oil cost increases incurred by a refiner not later than the last day of the calendar month which begins two months prior to the effective date of this paragraph and not passed through by the end of the last calendar month prior to the effective date of this paragraph unless such passthrough is not in excess of 10 percent of the total amount of such increased crude oil costs not passed through as of the last day of the last calendar month prior to the effective date of the amendment promulgated under section 8(a); and (*Ante*, p. 942.)

"(II) any net crude oil cost increases incurred by a refiner after the effective date of this paragraph, which net crude oil cost increases were not passed through within the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless —

"(aa) the President finds, and reports to the Congress with respect to such finding, that a passthrough of such crude oil cost increases is necessary to alleviate the impact on refiners, marketers, or consumers of significant increases in costs, to provide for equitable cost recovery consistent with the attainment, to the maximum extent practicable, of the objectives specified in paragraph (1), or to avoid competitive disadvantage; and

"(bb) such passthrough in any month of such crude oil cost increases is not in excess of 10 percent of the total amount of such crude oil cost increases as of the end of the calendar month in which the effective date of this paragraph occurs or any month thereafter;

"(C) shall provide for the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel, and refined petroleum products at all levels of marketing and distribution; and

"(D) shall not permit more than a direct proportionate distribution (by volume) to Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel), aviation fuel of a kerosene or naphtha type, and propane produced from crude oil, of any increased costs of crude oil incurred by a refiner; except that the

President may, by amendment to the regulation under subsection (a) or by order, permit deviation from such proportionate distribution of costs, if the President finds that refinery operations justify such deviation and further finds that to permit such deviation is consistent with the attainment of the objectives in paragraph (1) and would not result in inequitable prices for any class of users of such product.

As used in this paragraph, the term 'effective date of this paragraph' means the effective date specified in section 402(b) of the Energy Policy and Conservation Act.".

(b) The amendment made by this section, to the Emergency Petroleum Allocation Act (*infra.* Effective date.) of 1973, shall take effect on the effective date of (15 USC 753 note.) the amendment to the regulation under section 4(a), required by section 8(a) of such Act.

(c) The Emergency Petroleum Allocation Act of 1973, as amended (15 USC 751 note.) by this Act, is further amended by adding at the end thereof the following new section:

"LIMITATIONS ON PRICING AUTHORITY

"SEC. 10. The President shall have no authority, under this Act, or under the Energy Policy and Conservation Act, to prescribe minimum (15 USC 759. *Ante,* p. 871.) prices for crude oil (or any classification thereof), residual fuel oil, or any refined petroleum product.".

ENTITLEMENTS

SEC. 403. (a) Section 4 of the Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at (15 USC 753.) the end thereof the following:

"(e) Any provision of the regulation under subsection (a) of this section —

> "(1) which requires the purchase of entitlements, or the payment of money through any other similar cash transfer arrangement, the purpose of which is to reduce disparities in the crude oil acquisition costs of domestic refiners, and
>
> "(2) which is based upon the number of barrels of crude oil input, or receipts, or both, of any refiner,

shall not apply to the first 50,000 barrels per day of input, or receipts, or both, of any refiner whose total refining capacity (including the refining capacity of any person who controls, is controlled by, or is under common control with such refiner) did not exceed on January 1, 1975, and does not thereafter exceed 100,000 barrels per day. The preceding sentence shall not affect any provisions of the regulation under subsection (a) of this section with respect to the receipt by any small (15 USC 752.) refiner as defined in section 3(4) of payments for entitlements or any other similar cash transfer arrangement.".

(b) Subsection (a) of this section shall apply with respect to payments due on or after the last day of the month during which the (15 USC 753 note.) date of enactment of this Act occurs.

PART B — OTHER AMENDMENTS TO THE ALLOCATION ACT

AMENDMENTS TO THE OBJECTIVES OF THE ALLOCATION ACT

SEC. 451. (a) Section 4(b)(1)(A) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

> "(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as

individual homes, apartments and similar occupied dwelling units), and the national defense;".

(b) Section 4(b)(1)(G) of the Emergency Petroleum Allocation Act of 1973 is amended to read as follows:

"(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of —

"(i) fuels, and

"(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;".

PENALTIES UNDER THE ALLOCATION ACT

SEC. 452. Section 5 of the Emergency Petroleum Allocation Act of (15 USC 754.) 1973 is amended:

(1) by striking out "sections 205 through 211" in subsection (a)(1) of such section and inserting in lieu thereof "sections 205 through 207 and sections 209 through 211"; and

(2) by adding at the end of subsection (a) of such section the following:

"(3)(A) Whoever violates any provision of the regulation under section 4(a) of this Act, or any order under this Act shall be subject to a civil penalty —

"(i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;

"(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation; and

"(iii) with respect to activities —

(I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or

(II) activities not referred to in clause (i) or (ii) of [1] subclause (I) of this clause, of not more than $2,500 for each violation.

"(B) Whoever willfully violates any provision of such regulation, or any such order shall be imprisoned not more than 1 year, or —

"(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;

"(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;

"(iii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product at the retail level or any other person shall be fined not more than $10,000 for each violation;

or both.

"(4) Any individual director, officer, or agent of a corportion who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President.".

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[1] So in original. Probably should be "or".

ANTITRUST PROVISION IN ALLOCATION ACT

SEC. 453. Section 6(c) of the Emergency Petroleum Allocation Act (15 USC 755.) of 1973 is amended to read as follows:

"(c) There shall be available as a defense to any action brought for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this Act or with the regulation or any order under this Act.".

EVALUATION OF REGULATION UNDER THE ALLOCATION ACT

SEC. 454. The Emergency Petroleum Allocation Act of 1973 (15 USC 751 note.), as amended by this Act, is further amended by adding at the end thereof the following new section:

"REEVALUATION OF SECTION 4(a) REGULATION

"SEC. 11. (15 USC 760.) (a) Not later than 60 days after the date of enactment of this section, the President shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views, and arguments respecting the appropriateness of, or the continuing need for, the application of any provision of the regulation (15 USC 753.) promulgated under section 4(a) as such provision relates to the attainment of the objectives specified in section 4(b)(1) of section 4. A transcript shall be kept of any such oral presentations of data, views, and argument.

"(b) The President shall, after consideration of such written and oral presentations and such other information as may be available to him —

"(1) analyze such presentations and report thereon to the Congress within 120 days after the date of enactment of this section; and

"(2) shall promulgate, pursuant to the limitations and authority under section 12 *(Infra.)*, such amendment, or amendments, to the regulation promulgated under section 4(a) as he determines are necessary or appropriate —

"(A) to modify any provisions of such regulation in a manner which is consistent with the attainment, to the maximum extent practicable, of objectives specified in section 4(b)(1); or

"(B) to eliminate any provisions of such regulation no longer necessary to provide for the attainment of such objectives.".

CONVERSION TO STANDBY AUTHORITIES

SEC. 455. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"CONVERSION MECHANISM TO STANDBY AUTHORITIES

"SEC. 12. (a) The President may not amend the regulation (15 USC 760a.) under section 4(a) in any manner which —

"(1) exempts crude oil produced in the United States from any provision of such regulation required to be made a part of such regulation (*Ante,* p. 942.) by section 8; or

"(2) results in making such regulation, as so amended, inconsistent with any limitation or other requirement specified in section 8.

"(b) Except as provided in subsection (a), the President may amend the regulation under section 4(a) if he determines that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1) and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives.

"(c)(1) Any such amendment which, with respect to a class of persons or class of transactions (including transactions with respect to any market level), exempts crude oil, residual fuel oil, or any refined petroleum product or refined product category from the provisions of the regulation under section 4(a) as such provisions pertain to either (15 USC 753.) (A) the allocation of amounts of any such oil or product, or (B) the specification of price or the manner for determining the price of any such oil or product, or both of the matters described in subparagraphs (A) and (B), may take effect only pursuant to the provisions of this subsection.

"(2) The President shall submit any amendment referred to in paragraph (1) to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act. Any such (*Post,* p. 965.) amendment shall be accompanied by a specific statement of the President's rationale for such amendment and the matter described in subsection (d) of this section. Such an amendment—

"(A) may apply only to one oil or one refined product category;

"(B) may apply to the matters specified in either subparagraph (A) or (B) of paragraph (1) of this subsection, or both; and

"(C) may provide for scheduled or phased implementation.

"(3) As used in this section the term 'refined product category' ("Refined product category.") means —

"(A) motor gasoline;

"(B) Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel);

"(C) propane; or

"(D) all or any portion of other refined petroleum products as a class (including natural gas liquids and natural gas liquid products, other than propane).

"(4) Such an amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(d)(1) The President shall support any amendment described in subsection (b) which is transmitted to the Congress under subsection (c) of this section with a finding that such amendment is consistent with the attainment of the objectives specified in subsection 4(b)(1) and in the case of —

"(A) Any exemption described in subsection (c)(1)(A), with a finding that such oil or refined product category is no longer in short supply and that exempting such oil or refined product category will not have an adverse impact on the supply of any other oil or refined petroleum product subject to this Act; and

"(B) any exemption described in subsection (c)(1)(B), with a finding that competition and market forces are adequate to protest consumers and that exempting such oil or refined product category will not result in inequitable prices for any class or users of such oil or product.

"(2) Any amendment which the President submits to the Congress under subsection (c) of this section shall be accompanied —

"(A) by a statement of the President's views as to the potential economic impacts (if any) of such amendment which, where practicable, shall include his views as to —

"(i) the State and regional impacts of such amendment (including effects on governmental units);

"(ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as fuel or as feedstock for industry; and

"(iii) the effects on employment and consumer prices; and

"(B) in the case of an exemption described in subsection (c)(1)(B) of this section, by an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

"(e) In any judicial review of an amendment required by this section to be submitted to Congress in accordance with the procedures (*Post*, p. 965.) specified in section 551 of the Energy Policy and Conservation Act, the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of subsection (c), (d), or (g) of this section or subparagraph (A), (E), or (F), of section 706(2) of title 5, United States Code.

"(f) With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specification of price or the manner for determining the price, of any such oil or refined product category upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 4(b)(1). (15 USC 753.) Any such oil or refined product category for which allocation or price requirements are reimposed under authority of this subsection may subsequently be exempted without regard to the provisions of subsection (c) of this section.

"(g) Notwithstanding the provisions of subsection (e) of section 4. (*Ante*, p. 948.) the President may, if he determines that the exemption from payments for certain small refiners required by such subsection —

"(1) results in unfair economic or competitive advantage with respect to other small refiners; or

"(2) otherwise has the effect of seriously impairing the President's ability to provide in the regulation under section 4(a) for the attainment of the objective specified in section 4(b)(1)(D) and for the attainment of those other objectives specified in section 4(b)(1);

submit, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to modify the regulation under section 4(a) with respect to the provisions of such regulation as they relate to such exemption. Such amendment shall not take effect if disapproved by either House of Congress under the procedures specified in such section 551.".

PART B — PRODUCTION ENHANCEMENT AND OTHER RELATED MATTERS

EXEMPTION OF STRIPPER WELL PRODUCTION

SEC. 121. Section 8 of the Emergency Petroleum Allocation Act of 1973 (15 USC 757.) is amended by adding at the end thereof the following new subsection:

"(i)(1) The first sale price of stripper well crude oil shall be exempt from the regulation promulgated under section 4 of this Act as amended pursuant to the requirements of this section (15 USC 753.). For the purpose of this section, the President shall include in the computation of the actual weighted average first sale price for crude oil produced in the United States in any month subsequent to August 1976 the actual volume of stripper well crude oil produced in the United States in such subsequent month and such actual volume shall be deemed to have been sold at a first sale price equal to $11.63 per barrel plus the difference between the actual weighted average first sale price in August 1976, for crude oil, other than stripper well crude oil, produced in the United States, and the actual average first sale price in such subsequent month of all classifications of crude oil, other than stripper well crude oil, produced in the United States, weighted as if each such classification were produced in such subsequent month in the same proportion as such classification, or the most nearly comparable classification which existed on August 1, 1976, was produced in August 1976.

"(2) For the purposes of this subsection, ("Stripper well crude oil.") 'stripper well crude oil' means crude oil produced and sold from a property whose maximum average daily production of crude oil per well during any consecutive 12-month period beginning after December 31, 1972, does not exceed 10 barrels.

"(3) To qualify for the exemption (Qualification.) under this subsection, a property must be producing crude oil at the maximum feasible rate throughout the 12-month qualifying period and in accordance with recognized conservation practices.

"(4) The President may define terms used in this subsection consistent with the purposes thereof.".

ENHANCEMENT OF DOMESTIC PRODUCTION

SEC. 122. Section 8 of the Emergency Petroleum Allocation Act of 1973 (15 USC 757.) (as amended by section 121 of this Act) is further amended—

(1) in subsection (d)(1), by striking out "any adjustment as a production incentive shall not permit an increase in the maximum weighted average first sale price in excess of 3 per centum per annum (compounded annually), unless modified pursuant to this section, and";

(2) in subsection (d)(3)(C), by striking out ", including production from stripper wells";

(3) in subsection (e)(1), by striking out "(A) a production incentive adjustment to the maximum weighted average first sale price in excess of the 3 per centum limitation specified in subsection (d)(1), (B)", and by striking out "such subsection, or (C) both.", and inserting in lieu thereof "subsection (d)(1).";

(4) in subsection (e)(2), by striking out "an additional adjustment as a production incentive, or", and by striking out ", or both,";

(5) in subsection (f)(1), by adding before the period at the end thereof the following: "and an analysis of the effects on price and the production of domestic

crude oil resulting from the amendments made to this section by sections 121 and 122 of the Energy Conservation and Production Act";

(6) in subsection (f)(2), by striking out "The President may" and inserting in lieu thereof "On March 15, 1977, the President may";

(7) in subsection (f)(2)(A), by striking out "or modification", and by striking out "as may have been amended pursuant to subsection (e)";

(8) in subsection (f) (5), by striking out "or modify", and by striking out "or of a modification of such adjustment"; and

(9) by adding at the end thereof the following new subsection:

"(j)(1) As soon as practicable after the date of enactment of this subsection, taking into consideration the greater flexibility provided by the amendments relating to the production incentive adjustment under section 122 of the Energy Conservation and Production Act, the President shall promulgate such amendments to the regulation under section 4(a) (15 USC 753.) (relating to price) as shall (A) provide additional price incentives for bona fide tertiary enhanced recovery techniques and (B) provide for the adjustment of differentials in ceiling prices for crude oil that are the result of gravity differentials which are arbitrary, discriminatory, applied on a regional or local basis without reasonable justification, or fail substantially to reflect current relative market valuations of such differentials.

"(2) As used in this subsection, the term ("Tertiary enhanced recovery techniques.") 'tertiary enhanced recovery techniques' means extraordinary and high cost enhancement technologies of a type associated with tertiary applications including, to the extent that such techniques would be uneconomical without additional price incentives, miscible fluid or gas injection, chemical flooding, steam flooding, microemulsion flooding, in situ combustion, cyclic steam injection, polymer flooding, and caustic flooding and variations of the same. The President shall have authority to further define the term by (Rule.) rule.".

• • •

ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

[42 U.S.C. 6393] Sec. 523. (a)(1) Subject to paragraphs (2), (3), and (4) of this subsection, the provisions of subchapter II of chapter 5 of title 5, United States Code, shall apply to any rule, regulation, or order having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code, issued under title I (other than section 103 thereof) and title II of this Act, or this title (other than any provision of such titles which amends another law).

(2)(A) Notice of any proposed rule, regulation, or order described in paragraph (1) which is substantive and of general applicability shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of 30 days following the date of such publication and prior to the effective date of the rule shall be provided for opportunity to comment; except that the 30-day period for opportunity to comment prior to the effective date of the rule may be —

(i) reduced to no less than 10 days if the President finds that strict compliance would seriously impair the operation of the program to which such rule, regulation, or order relates and such findings are set out in such rule, regulation, or order, or

(ii) waived entirely, if the President finds that such waiver is necessary to act expeditiously during an emergency affecting the national security of the United States.

(B) Public notice of any rule, regulation, or order which is substantive and of general applicability which is promulgated by officers of a State or political subdivision thereof or to State or local boards which have been delegated authority pursuant to title I or II of this Act or this title (other than any provision of such title) which amend another law shall, to the maximum extent practicable, be achieved by publication of such rules, regulations, or orders in a sufficient number of newspapers of general circulation calculated to receive widest practicable notice.

(3) In addition to the requirements of paragraph (2) and to the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded and such opportunity shall be afforded prior to the effective date of such rule, regulation, or order, but in all cases such opportunity shall be afforded no later than 45 days, and no later than 10 days (in the case of a waiver of the entire comment period under paragraph (2)(ii)), after such date. A transcript shall be made of any oral presentation.

(4) Any officer or agency authorized to issue rules, regulations, or orders described in paragraph (1) shall provide for the making of such adjustments, consistent with the other purposes of this Act as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens and shall in rules prescribed by it establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, or an exception to or exemption from, such rules, regulations and orders. If such person is aggrieved or adversely affected by the denial of a request for such action under the

preceding sentence, he may request a review of such denial by the officer or agency and may obtain judicial review in accordance with subsection (b) or other applicable law when such denial becomes final. The officer or agency shall, by rule, establish appropriate procedures, including a hearing where deemed advisable, for considering such requests for action under this paragraph.

(b) The procedures for judicial review established by section 211 of the Economic Stabilization Act of 1970 shall apply to proceedings to which subsection (a) applies, as if such proceedings took place under such Act. Such procedures for judicial review shall apply notwithstanding the expiration of the Economic Stabilization Act of 1970.

(c) Any agency authorized to issue any rule, regulation, or order described in subsection (a)(1) shall, upon written request of any person, which request is filed after any grant or denial of a request for exception or exemption from any such rule, regulation, or order, furnish such person, within 30 days after the date on which such request is filed, with a written opinion setting forth applicable facts and the legal basis in support of such grant or denial.

Opposition

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FILED
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No. 81-1191

In the Supreme Court of the United States

OCTOBER TERM, 1981

WIGGINS BROTHERS, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals over "all appeals from the district courts of the United States in cases and controversies arising under" the Emergency Petroleum Allocation Act of 1973 (EPAA) extends to an appeal by the Department of Energy, in an action brought under the EPAA, from a judgment of the district court declaring that DOE had improperly interpreted one of its own regulations, which was issued pursuant to the EPAA.

2. Whether the Temporary Emergency Court of Appeals correctly upheld the Department of Energy's interpretation of its Marginal Property Rule, 10 C.F.R. 212.72, as excluding injection wells from being counted as "wells that produced crude oil."

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

A. The marginal property rule 2

B. The rulings below 5

Argument 7

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 10

Bray v. *United States*, 423 U.S. 73 8

Burns v. *Alcala*, 420 U.S. 575 .... 8, 9

Duncan v. *Theis*, 613 F. 2d 305 .... 4, 10

Energy Reserves Group, Inc. v. *DOE*, 589 F. 2d 1082, on remand *sub nom. DOE Stripper Well Exemption Litigation, In re*, 520 F. Supp. 1232 .... 4, 6, 10

Perrin v. *United States*, 444 U.S. 37 8

Sohio Petroleum Co. v. *Caribou Four Corners, Inc.*, 573 F. 2d 1259 8

Train v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 9

United States v. *American Trucking Associations, Inc.*, 310 U.S. 534 9

Page

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 553(c) . . . 9

Economic Stabilization Act of 1970 (ESA), Section 211(b)(2), 12 U.S.C. 1904 note 7

Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* 3
  Section 4(a), 15 U.S.C. 753(a) 7
  Section 5(a)(1), 15 U.S.C. 754(a)(1) 1-2, 7

Energy Conservation and Production Act (ECPA), 42 U.S.C. 6801 *et seq.* 3

Energy Policy and Conversation Act (EPCA), Section 401, 15 U.S.C. 757 7

Federal Register Act, 44 U.S.C. 1507 6

Marginal Property Rule, 10 C.F.R. 212.72 . . . 2, 3-4

Stripper Well Exemption Regulation, 10 C.F.R. 212.54 (1979) 4

Miscellaneous:

Federal Energy Administration Ruling 1974-29, 39 Fed. Reg. 44414 (1974) 4
  43 Fed. Reg. 52186 (1978) 2
  43 Fed. Reg. 52188 (1978) 4
  44 Fed. Reg. 22010 (1979) 2-3
  44 Fed. Reg. 25160 (1979) 3

S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971) 8

Williams & Meyers, *Manual of Oil and Gas Terms* (4th ed. 1976) 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1191

WIGGINS BROTHERS, INC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-10 to A-39) is reported at 667 F. 2d 77. The opinion of the district court (Pet. App. A-1 to A-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1981. A petition for rehearing was denied on November 27, 1981. The petition for a writ of certiorari was filed on December 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATEMENT

In November 1979, petitioners filed this action in the United States District Court for the Northern District of Texas under Section 5(a)(1) of the Emergency Petroleum

Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), seeking to enjoin the Department of Energy (DOE) from enforcing its Marginal Property Rule, 10 C.F.R. 212.72. Specifically, petitioners challenged the Rule's exclusion of injection wells[1] from the determination of "average daily production" and "average completion depth" contained in the regulation's definitions. The district court entered judgment for petitioners, holding that injection wells were to be counted under the regulation and enjoining the Department from excluding the counting of injection wells in applying the regulation to petitioners' property. DOE appealed to the Temporary Emergency Court of Appeals (TECA), which reversed the judgment of the district court and upheld DOE's exclusion of injection wells in the application of the Marginal Property Rule.

A. The Marginal Property Rule

The Department of Energy proposed the Marginal Property Rule on November 2, 1978, as one of several alternative means of encouraging increased production of domestic crude oil through changes in the Department's price-control regulations. 43 Fed. Reg. 52186 (1978). In April 1979, DOE promulgated the final rule without substantial modification of the initial proposal. 44 Fed. Reg. 22010

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[1] The court of appeals quoted from a definition of "injection well" in an oil and gas treatise (Pet. App. A-37, quoting Williams & Meyers, *Manual of Oil and Gas Terms* 291 (4th ed. 1976)):

> A well employed for the introduction into an underground stratum of water or gas under pressure. Injection wells are employed for the disposal of salt water produced with oil. They are also employed in a pressure maintenance, secondary recovery or recycling operation to introduce a fluid into the producing formation to maintain underground pressures which would otherwise be reduced by virtue of the production of oil and/or gas. *Syn.*: Input well.

(1979); 10 C.F.R. 212.72 (1979).[2] The rule was promulgated pursuant to DOE's general authority under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751 *et seq.*, as amended by the Energy Conservation and Production Act, 42 U.S.C. 6801 *et seq.*

The Marginal Property Rule permitted producers of crude oil to charge upper-tier ceiling prices for crude oil produced and sold from properties qualifying as "marginal" under certain prescribed standards. In order for a property to qualify for the rule, the average daily production of crude oil during an established qualifying period could not exceed a particular number of barrels at particular average completion depths. These concepts are defined in the regulations as follows (Pet. App. A-68; 10 C.F.R. 212.72 (1979) (emphasis added)):

> "Average completion depth" means for each particular marginal property the sum of all completion depths for all *wells that produced crude oil* from the property concerned during the calendar year 1978, divided by the number of such wells during that 12-month period.
>
> "Average daily production" means for each particular marginal property the qualified maximum total production of crude oil * * * produced from a property, divided by 365 times the *number of wells that produced crude oil* * * * from that property during calendar year 1978. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production throughout the 12-month period and in accordance with recognized conservation practices, and not

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[2] The Marginal Property Rule was later republished with corrections that are not relevant here. 44 Fed. Reg. 25160 (1979) (Pet. App. A-40 to A-79).

> significantly curtailed by reason of mechanical failure or other disruption in production.

Under the terms of the regulations, therefore, only "wells that produced crude oil" were to be counted in calculating both "average completion depth" and "average daily production." DOE argued in the district court that this language, on its face, limited the well count for these determinations to wells that actually yield crude oil, and excluded injection wells and other kinds of wells that do not actually produce crude oil themselves but merely aid in the production process.

DOE's interpretation was consistent with its Ruling 1974-29 (39 Fed. Reg. 44414 (1974)), in which the Department had previously interpreted identical language in its Stripper Well Exemption Regulation, 10 C.F.R. 212.54 (1979), to exclude injection wells.[3] TECA upheld this interpretation of the latter regulation in *Energy Reserves Group, Inc.* v. *DOE*, 589 F. 2d 1082 (TECA 1978).[4] See also *Duncan* v. *Theis*, 613 F. 2d 305 (TECA 1979).

Moreover, in its preamble to the Marginal Property Rule, DOE made clear that the rule specifically excluded injection wells. With regard to "average completion depth" the agency stated (Pet. App. A-56; emphasis added):

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[3] In the preamble to the Marginal Property Rule, DOE noted that the concept of a "marginal property" was analogous to a stripper well property. Thus, DOE stated that Ruling 1974-29 would be applicable to the instant regulation (Pet. App. A-55). The Notice of Proposed Rulemaking had also referred to Ruling 1974-29 as applicable to the Marginal Property Rule. See 43 Fed. Reg. 52188 (1978).

[4] TECA remanded that case to the district court for decision on whether the regulation as so interpreted was consistent with the underlying stripper well exemption statute. The district court subsequently invalidated the regulation as contrary to the intent of Congress. *In Re DOE Stripper Well Exemption Litigation*, 520 F. Supp. 1232 (D. Kan. 1981), appeal pending *sub nom. Energy Reserves Group, Inc.* v. *DOE*, No. 10-39 (TECA, filed Aug. 13, 1981).

> In order to determine whether a particular property qualifies as a marginal property, the producer must first calculate the property's "average completion depth" of all wells that produced crude oil on the property during the qualifying period. This calculation involves dividing the sum of the completion depths for all such wells by the number of those wells. *Injection wells and other wells that did not produce crude oil during the qualifying period may not be counted for purposes of these calculations.*

A similar explanation was included for "average daily production" (Pet. App. A-57; emphasis added):

> A property's average daily production during the qualifying period must be determined in the same way as is done for stripper well properties, and the provisions of the relevant stripper well property rulings will be applicable with respect to such computations. Accordingly, in calculating a property's average daily production, for example, a *producer may not count injection wells*, or other wells that did not produce crude oil during the qualifying period.

B. The Rulings Below

The district court held that under the Marginal Property Rule, "injection wells may be counted as 'wells that produced crude oil'" (Pet. App. A-1 to A-9). The court enjoined DOE from excluding injection wells in applying the regulation to petitioners' property. While acknowledging that DOE had clearly intended to exclude injection wells, as reflected in the preamble to the regulation (*id.* at A-7), the court nonetheless held that the "plain meaning" of the regulation was to the contrary (*ibid.*). The court derived its "plain meaning" not from the language of the regulation itself, however, but rather from certain extrinsic material, including testimony given in other cases by employees of other oil companies about how injection wells assist in the production of crude oil from producing wells, and evidence regarding the practices of various state commissions and the Department of the Interior concerning the calculation of "allowables" and royalties (*id.* at A-5 to A-7).[5] The district court disregarded the preamble, which was published in the Federal Register when the Rule was promulgated, because the preamble was not also published in the Code of Federal Regulations (*id.* at A-4).

The court of appeals reversed (Pet. App. A-10 to A-39). The court held that the district court erred in failing to consider the preamble "in construing the regulation and determining the meaning of the regulation" (*id.* at A-33). The court rejected, as contrary to the Federal Register Act, 44 U.S.C. 1507, and general rules of statutory construction, the district court's conclusion that the preamble could be ignored because it is not contained in the Code of Federal Regulations (Pet. App. A-33 to A-35).

In addition, TECA held that the district court had misapplied the "plain meaning" rule of statutory construction. Specifically, TECA noted that it had upheld a DOE ruling in *Energy Reserves Group, Inc.* v. *DOE, supra*, in which the identical language had been interpreted to exclude injection wells (Pet. App. A-36). TECA observed that the district court should not have relied on the extrinsic evidence of industry testimony because it was the *agency's* interpretation, rather than the industry's, that was significant (*ibid.*). The court also pointed out that the agency's interpretation was in any event consistent with "the general definitions recognized by the industry" as reflected in an oil and gas treatise (*id.* at A-37 to A-38).

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[5] This testimony was incorporated by reference into the record of the instant case. It was given during preliminary injunction hearings held in April 1978 and February 1979 in cases challenging the Department's position that injection wells were to be excluded from the definition of "wells that produced crude oil" in the Stripper Well Exemption regulation.

ARGUMENT

1. Petitioners contend (Pet. 6-13) that TECA lacked subject matter jurisdiction over the appeal in this case. This argument, which petitioners concede (Pet. 13) they did not raise below, is without merit.

Despite petitioners' belated argument to the contrary, it is clear that TECA properly exercised jurisdiction over this case because petitioners' complaint asserted a claim based directly on the EPAA. Under the plain language of Section 211(b)(2) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note,[6] TECA has exclusive appellate jurisdiction of "all appeals" in cases "arising under" the EPAA.

Moreover, petitioners' jurisdictional argument rests on the faulty premise that the regulation at issue was promulgated pursuant to Section 401 of the Energy Policy and Conservation Act (EPCA), 15 U.S.C. 757, rather than Section 4(a) of the EPAA, 15 U.S.C. 753(a). While the amendments to the EPAA by the EPCA provided the specific stimulus for the promulgation of the Marginal Property Rule, the rule was actually promulgated pursuant to DOE's general authority under Section 4(a) of the EPAA. Those amendments did nothing to divest TECA of its jurisdiction over EPAA cases.

Creating an exception to TECA's jurisdiction with regard to one small portion of DOE's regulations would defeat the very purpose for which the court was established by Congress. As this Court has recognized, TECA was given exclusive jurisdiction of all EPAA cases "to provide speedy resolution of cases brought under the [EPAA] and 'to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision.' " *Bray* v. *United States*, 423 U.S. 73, 74 (1975), quoting from S. Rep. No. 92-507, 92d Cong., 1st Sess. 10 (1971). See also, *e.g.*, *Sohio Petroleum Co.* v. *Caribou Four Corners, Inc.*, 573 F. 2d 1259, 1262-1263 (TECA 1978). Accordingly, TECA properly exercised jurisdiction over the instant case.

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[6] Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1), which was cited by petitioners in their complaint as the basis for this lawsuit, expressly incorporates the judicial review provision of Section 211(b)(2) of the ESA.

2. Petitioners next argue (Pet. 13-26) that TECA erred in upholding DOE's interpretation of the Marginal Property Rule as excluding injection wells. This argument is insubstantial and does not warrant review.

This Court has repeatedly emphasized that "[a] fundamental canon of statutory construction is that, *unless otherwise defined*, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (emphasis added). See *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975). Petitioners argue that if given its ordinary meaning, the phrase "wells that produced crude oil" in the Marginal Property Rule includes injection wells. But petitioners ignore the fact that prior to promulgating the instant rule, DOE had specifically defined the identical phrase in a similar regulation as excluding injection wells and TECA had upheld this administrative interpretation. Thus, at the time the instant rule was issued, the phrase "wells that produced crude oil" carried a clear regulatory meaning that was specifically reaffirmed by DOE in the preamble to the rule.

Petitioners' approach is inconsistent with the Court's recognition in *Perrin* and *Burns* that words are to be given their ordinary meaning only if they are not "otherwise defined." Thus, in *Burns* v. *Alcala*, *supra*, 420 U.S. at

581-582, this Court relied on the legislative history and the purpose of the statute in construing the term "dependent child" in the Social Security Act. Similarly, in *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976), quoting *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940), the Court held that the "plain meaning" rule does not exclude reference to legislative history to determine congressional intent:

> "When [such] aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

Under petitioners' view, resort to such routine aids of construction would not be permissible.

Here, TECA properly referred to the preamble in interpreting the meaning of the phrase "wells that produced crude oil."[7] A preamble is the contemporaneous, definitive declaration by the issuing agency of the basis and purpose of its rule, specifically required by the Administrative Procedure Act, 5 U.S.C. 553(c), and published in the Federal Register together with the regulations that it interprets. Petitioners' contention that TECA erred in looking to the preamble as an aid in interpreting the regulation is patently without merit.[8]

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[7] Petitioners claim (Pet. 21) that TECA was not justified in relying on the preamble because TECA found the Marginal Property Rule to be clear and unambiguous. But TECA concluded that the plain meaning supported DOE's, not petitioners', interpretation of the regulation.

[8] Petitioners' argument (Pet. 22) that "TECA erred in holding that an agency interpretation was binding on the district court" misconstrues TECA's opinion. The court of appeals merely held (1) that the district court should have considered the preamble in construing the regulation (Pet. App. A-34 to A-35), and (2) that in considering the preamble, the district court, in the absence of exceptional circumstances, should have

3. Finally, petitioners' reliance (Pet. 25-26, 27-29) on the district court's opinion in *In Re DOE Stripper Well Exemption Litigation*, 520 F. Supp. 1232 (D. Kan. 1981), appeal pending *sub nom. Energy Reserves Group, Inc.* v. *DOE*, No. 10-39 (TECA, filed Aug. 13, 1981), is misplaced. As we have already noted (see page 4 & note 4, *supra*), in *Energy Reserves Group, Inc.* v. *DOE*, *supra*, and *Duncan* v. *Theis*, *supra*, TECA upheld DOE's interpretation of the phrase "wells that produced crude oil" in the Stripper Well Exemption Regulation as excluding injection wells. On remand, the district court, in the decision on which petitioners rely, held that the stripper well regulation, as so interpreted, is inconsistent with the underlying stripper well exemption statute. Thus, the issue in this case regarding the proper meaning of DOE's regulation is considerably different from that presented in the current *Energy Reserves Group* appeal. TECA's decision in the instant case is fully consistent with its prior decisions in *Energy Reserves Group, Inc.* v. *DOE*, *supra*, and *Duncan* v. *Theis*, *supra*.

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deferred to the agency's interpretation of its own regulation unless that interpretation was plainly erroneous or inconsistent with the regulation (*id.* at A-34, citing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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